TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 236 90.

JOHN J. WALSH, PLAINTIFF IN ERROR,

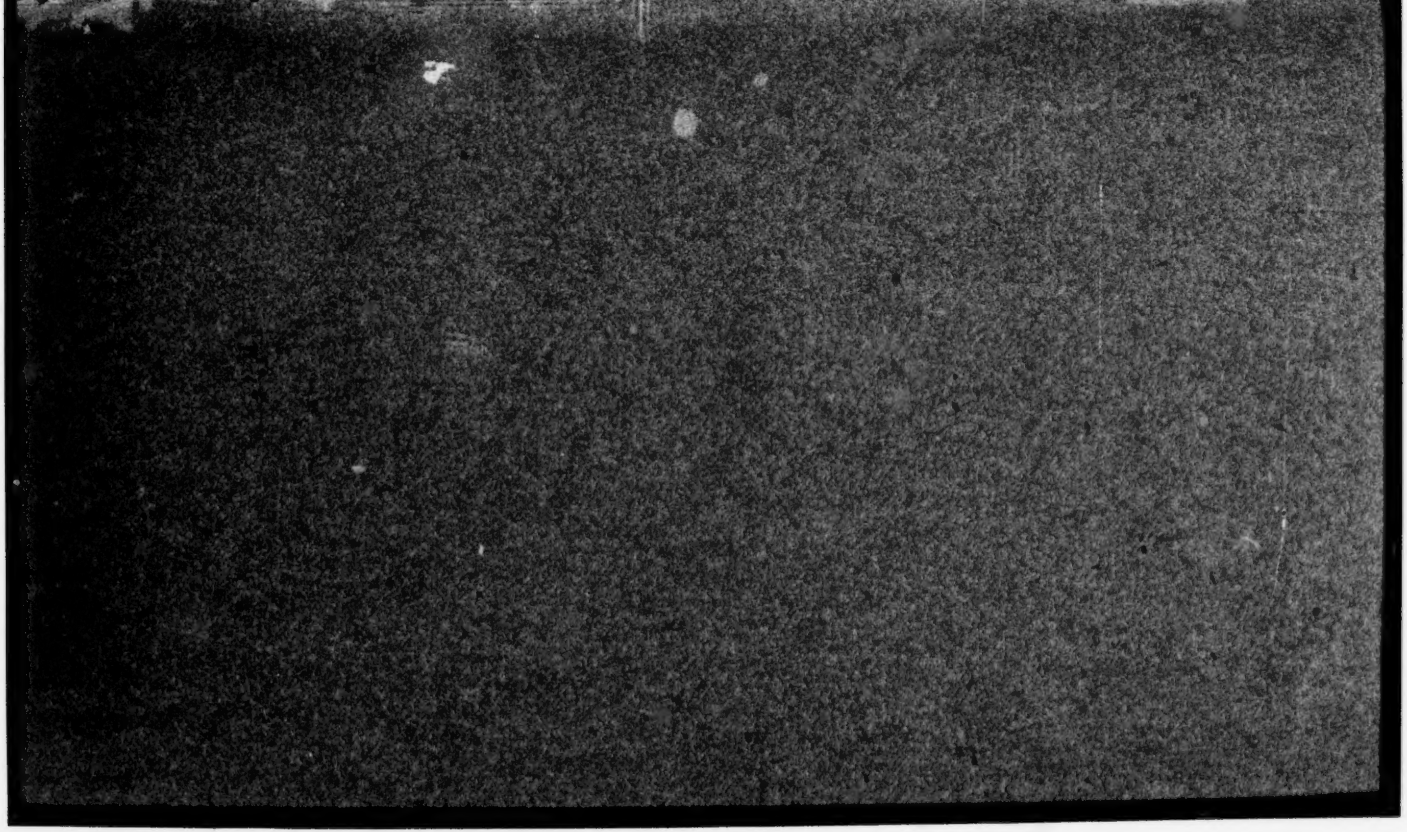
vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JUNE 6, 1900.

(16,901.)



(16,901.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 316.

JOHN J. WALSH, PLAINTIFF IN ERROR,

vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

	Original.	Print.
Caption	1	1
Petition in error	5	2
Waiver of summons in error, &c.	6	1
Transcript from circuit court of Franklin county	7	2
Docket and journal entries	7	2
Judgment	8	3
Transcript from court of common pleas	9	3
Docket entries	9	3
Judgment entry	10	3
Petition	11	4
Præcipe for summons	25	12
Demurrer to petition	26	13
Judgment	26	13
Appeal to circuit court	27	13
Docket and journal entries	28	14
Judgment	28	14
Order to certify Federal question	29	14
Clerk's certificate	31	16
Opinion	32	16
Reporter's certificate	76	41
Writ of error	77	41
Citation and service	80	42
Assignment of errors	82	42

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1898.

1-4 Supreme Court of Ohio.

JOHN J. WALSH, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS Railroad Company, Defendant in Error. } No. 5622.

Record.

In error to the circuit court of Franklin county.

R. A. Harrison, T. E. Powell, J. B. Foraker, D. J. Ryan, attorneys for plaintiff in error.
D. L. Sleeper, attorney for defendant in error.

Filed Aug. 4, 1897. In supreme court Ohio.
J. B. ALLEN, *Clerk.*

5 Supreme Court of Ohio.

JOHN J. WALSH, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS Railroad Company, Defendant in Error. } No. 5622.

Petition in Error.

(Filed June 25, 1897.)

The said John J. Walsh, plaintiff in error, complains of The Columbus, Hocking Valley and Athens Railroad Company, defendant in error, and says:

That at the January term, A. D. 1897, of the circuit court in and for Franklin county, Ohio, to wit: on the 2d day of April, A. D. 1897, the defendant in error recovered a judgment by the consideration of said court against the plaintiff in error in a certain action then pending in said court, wherein the said plaintiff in error was plaintiff and the defendant in error was defendant, together with the costs of suit a certified copy of the journal entries in said action, together with the original papers therein, is herewith filed.

Plaintiff in error avers that there is error in said judgment, proceedings, and record in this, to wit:

1. Said circuit court erred in sustaining the demurrer of the defendant to the plaintiff's petition.

6 2. Said court erred in dismissing the plaintiff's petition in said cause.

3. Said court erred in rendering judgment against the plaintiff for the costs of said action.

Wherefore, the plaintiff in error prays that said judgment of the

circuit court be reversed and that the plaintiff in error may be restored to all things he has lost by reason thereof.

R. A. HARRISON,
T. E. POWELL,
J. B. FORAKER,
D. J. RYAN,
Attorneys for Plaintiff in Error.

The defendant in error hereby waives the issue and service of summons in error in the above-entitled cause and enters the appearance of the defendant in error herein.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILWAY CO.,
By D. L. SLEEPER,
Attorney for Defendant in Error.

7 *Transcript of Docket and Journal Entries.*

In the Circuit Court.

(Filed June 25, 1897.)

1895, April 22.—Appeal bond filed.
1895, April 22.—Transcript, journal entries filed.
1895, April 22.—Original papers filed.
1897, April 2.—Defendant's demurrer sustained. Defendant to receive costs of plaintiff's exceptions by plaintiff. 4–594.

January Term, April 2, 1897.

This day came the parties and thereupon this cause came on to be heard upon the demurrer filed by the defendant herein to the petition of the plaintiff, and was argued by counsel and submitted to the court; on consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing and not desiring to plead further, it is considered by the court that the defendant go hence without day and receive from the plaintiff its costs herein expended. To all of which orders, judgments and decrees the plaintiff by his counsel excepts.
(Duly certified.)

8 In the Circuit Court, Franklin County, Ohio.

JOHN J. WALSH, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILWAY, Defendants. } No. 1079.

Entry.

(Filed April 2, 1897.)

This day came the parties and thereupon this cause came on to be heard on the demurrer filed by the defendant herein to the petition

of the plaintiff and was argued by counsel and submitted to the court;

On consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing, and not desiring to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein expended.

To all of which orders, judgments and decrees the plaintiff by his counsel excepts.

9 *Transcript of Journal Entries.*

In the Court of Common Pleas.

(Filed in circuit court April 22, 1895.)

I, Charles F. Galloway, clerk of the court of common pleas, within and for the county of Franklin, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit:

1895, March 14.—Petition, affidavit and precipe filed. Temporary restraining order allowed. Bond fixed at $300.00 Bond filed. Summons and copy of entry issued to sheriff of Franklin county, Ohio. Returned, March 25. Answer, April 13, 1895. Copy of petition, $6.00.

1895, April 17.—Demurrer of defendant filed.

1895, April 18.—Motion for temporary injunction overruled. Defendant's demurrer sustained. Judgment against plaintiff for costs. Plaintiff serves notice of appeal. Bond fixed at $100.00. 93-290.

1895, April 22.—Appeal bond filed.

April Term, April 18th, 1895.

This day came the said parties by their respective counsel and thereupon came on for hearing the motion of the said plaintiff for a temporary injunction against the said defendant, was heard upon the petition and affidavits, exhibits, and other evidence and the arguments of counsel and was submitted to the court; upon consideration whereof, and the court being fully advised in the premises, it is considered and adjudged by the court that said motion is not well taken and the same is therefore overruled; to which ruling and order the plaintiff at the time duly excepted; thereupon came

10 the defendant and filed its demurrer to the petition of the plaintiff herein upon the grounds that the facts stated therein are not sufficient to constitute a cause of action in favor of said plaintiff and against the defendant; upon arguments of counsel and submission to the court, it is considered that said demurrer is well taken and the same is sustained, to which ruling of the court the plaintiff at the time duly excepted; therefore, the plaintiff not desiring to plead further herein, it is adjudged and considered that the said defendant go hence without day, and that it recover its costs

herein against the plaintiff, whose petition is hereby dismissed; to which the plaintiff also at the time duly excepted, and therefore the plaintiff gave notice of his intention to appeal his case to the circuit court, and the court do fix the undertaking to be given to perfect said appeal at $100.00.

(Duly certified.)

11 Court of Common Pleas, Franklin County, Ohio.

JOHN J. WALSH, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD Company, Defendant.

Petition.

(Filed March 14, 1895.)

The said plaintiff, John J. Walsh, complains of the defendant, The Columbus, Hocking Valley and Athens Railroad Company, and says that he is the owner in fee-simple of certain lands and tenements situated in the county of Fairfield and State of Ohio, and being bounded and described as follows:

Situate in the north half of section number twenty (20), township fifteen (15), range nineteen (19), Greenfield township, Fairfield county, Ohio.

Beginning at a point in the center of the Hocking canal, south ten (10) degrees, east along the said canal sixteen (16) chains from the north line of said section; thence north eighty-two degrees (82), east eleven (11) chains to the center of the Lancaster and Carroll pike, thence with the center of said pike south forty-five (45) degrees, east four (4) chains, four (4) links, thence south fifty-seven (57) degrees, east five (5) chains, ninety-one (91) links; thence south sixteen (16) chains, ninety-five (95) links to the center of said Hocking canal; thence north fifty-two (52) degrees, west
12 along the center of said canal twelve (12) chains, thirty-eight (38) links; thence west fifteen (15) chains, thirty-one (31) links; thence north eleven (11) chains, eighty-five links to a stone; thence north seventy (70) degrees, east six (6) chains, fifty (50) links to the place of beginning. Containing thirty-six and twenty-hundredths (36.20) acres of land, more or less; subject, however, to the right of way one hundred feet in width owned and occupied by the Columbus, Hocking Valley & Toledo Railway Company.

That said lands are located on both sides of the Hocking canal about five (5) miles north of the city of Lancaster, in the said county. That said canal runs through the said lands north and south, dividing the said lands hereinbefore described into two sections.

Plaintiff further says that the said Hocking canal which runs through the lands above described extends from the village of Carroll in the county of Fairfield, from the Ohio canal, through the counties of Fairfield and Athens to the village of Nelsonville in

said last-named county, and the same has since its construction been a part of the canal system of the State of Ohio, and an extension of the Ohio canal, and the State of Ohio is the owner of said canal, which is now in use for navigation and other purposes hereinafter set forth.

The plaintiff further says that the said defendant, The Columbus, Hocking Valley and Athens Railroad Company, on the 12th day of April, A. D. 1894, filed with the secretary of state its articles of incorporation in said name, which articles of incorporation were then and there duly recorded, and that the principal office of said company fixed by said articles, is at the city of Columbus, in the county of Franklin in said State. Said corporation was organized
13 for the purpose of building and operating a railroad from the city of Columbus, in the county of Franklin and extending through the counties of Franklin, Fairfield, Hocking and Athens, to the city of Athens, all in the State of Ohio.

The plaintiff further says that while the capital stock of said defendant was fixed at a hundred thousand dollars by its articles of incorporation, and while the same has been ostensibly subscribed, the same has not been paid in cash nor has any part thereof been paid in cash or in any other manner except a few hundred dollars. And while the said defendant has obtained a certificate of incorporation from the secretary of state, the said corporation has not been legally organized, and the said company is not authorized to act as a corporation or to exercise the power of eminent domain which it is attempting to do as hereinafter set forth.

And the plaintiff further says that the said defendant since the 18th day of May, A. D. 1894, has been and still is claiming the right, privilege and franchise, of entering upon, taking possession of, and controlling the Hocking canal above described, and especially that portion extending through the lands of plaintiff above described, including all the property, right, interests and appurtenances connected with said Hocking canal between the points above named. And the said defendant has located a line of road through the lands of the said plaintiff hereinbefore described following the tow-path of said Hocking canal, and the said defendant is illegally and wrongfully claiming the right of entering upon said canal property and the said premises of the plaintiff hereinbefore described, and it is about to construct a railroad through said lands which will place additional and heavy burdens upon the lands of the plaintiff.
14 The said defendant claims the right, privilege and franchise of taking possession of said property and constructing and operating a railroad along and over the said canal and the premises of the said plaintiff, by virtue of an act of the General Assembly of the State of Ohio, passed on the 18th day of May, A. D. 1894. Said act is in the words and figures following, to wit:

S. B. An act No. 315.

To provide for the abandonment of the Hocking canal for canal purposes and for leasing the same to the Columbus, Hocking Valley and Athens Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking canal, from its junction with the Ohio canal in the village of Carroll, Fairfield county, to its southeastern terminus in the village of Nelsonville, Athens county, be and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

SEC. 2. There is hereby granted the right, franchise, and privilege of constructing, maintaining and operating over, upon and along the Hocking canal and property of the State of Ohio adjacent thereto, a railroad with single or double tracks, side tracks, switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley and Athens Railroad Company, its successors and assigns for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the treasurer of the State of Ohio, on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

SEC. 3. Said installment of fifty thousand dollars shall be paid into the State treasury before the construction of said railroad is begun, and for the remaining installments of rental the State of Ohio shall have the first lien upon said railroad, together with its switches, side tracks, bridges, and other structures erected on said property of the State of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said Columbus, Hocking Valley and Athens Railroad Company shall further execute unto the State of Ohio, to be approved by the auditor of State, the secretary of state and attorney general, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars conditioned that the said company will faithfully build said railroad in compliance with the conditions and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the State of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond shall be executed and filed with the secretary of state within ten days after the passage of this act.

SEC. 4. In consideration of the payment aforesaid, said railroad company, its successors and assigns, shall have the exclusive right during the term aforesaid to use and occupy the property aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property-holders along said canal, and shall hold the State

harmless from all loss or damage resulting to such property-
16 holders by reason of the construction and operation of said railroad. Provided that when said railroad, its successors and assigns cease to use said canal for railroad purposes, said canal property shall revert to the State for canal purposes.

SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this State.

SEC. 6. The work of constructing said railroad shall be commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

SEC. 7. This act shall take effect and be in force from and after its passage.

LEONIDAS H. SOUTHARD,
Speaker pro Tem. of the House of Representatives.
ANDREW L. HARRIS,
President of the Senate.

Passed May 18th, 1894.

The said plaintiff further says, that if the said defendant is permitted to enter upon said canal and construct its railroad thereon, it will divide the lands of the said plaintiff into two sections; and the construction of said railroad will place increased burdens upon his said lands, and will cut off and destroy his access to different parts of said lands and will render his access to and egress from different portions of said lands very difficult and inconvenient, and great additional burdens will be placed upon his said lands by reason of the change from a canal to a railroad; and his said property will be so affected and impaired as to render the same of very little or no value.

The plaintiff further says, that since the said Hocking canal was abandoned by the State of Ohio, by the act of May
17 18th, 1894, the fee in the said lands occupied by said canal bed has reverted to the said plaintiff. That the State of Ohio, at the time of the passage of said act, and for a long time prior thereto, had an easement in the said canal bed and in the lands covered, for canal purposes only. The fee thereto subject to said easement remaining in the former owners and in this plaintiff who has succeeded to the title thereto by regular and proper deeds of conveyance in fee-simple, and that since the said abandonment the said plaintiff is the owner of that portion of the canal bed and tow-path, extending through his lands, as hereinbefore described; and that the said defendant is claiming the right to enter upon the said land and canal bed and construct a railroad extending through the premises of the plaintiff without any right or authority whatever, and in violation of the rights and interests of the plaintiff.

The said Hocking Canal property, above described, was acquired by the State of Ohio, and the said canal was constructed under and by virtue of certain acts of the Congress of the United States, and of the General Assembly of the State of Ohio, under and by virtue of certain agreements entered into by and between

the United States and the State of Ohio, as hereinafter set forth. That between the 23d day of February, 1820, and the 8th day of February, 1825, the General Assembly of the State of Ohio presented to the Senate and House of Representatives of the United States, memorials and resolutions in which were set forth the advantages which the United States would derive from the construction of certain canals, and particularly the Ohio canal, extending from the Ohio river at the mouth of the Scioto river, to Lake Erie, and requesting the Congress of the United States to grant to the State of
18 Ohio aid in the construction of said canal and extensions thereof, which might thereafter be made.

And thereupon, in response to said resolutions and memorials, on the 24th day of May, 1828, the Congress of the United States passed an act entitled "An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State to aid in the construction of said canals authorized by law;" the fifth section of which act is in the words and figures following, to wit:

"SEC. 5. And be it further enacted, That there be and hereby is granted to the State of Ohio, five hundred thousand acres of land owned by the United States, within the said State of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, contracted by said State in the construction of the canals within the same, undertaken under the authority of the laws of the said State now in force, or that may hereafter be enacted, for the extensions of canals now making; which lands, when selected, shall be disposed of by the legislature of Ohio, for that purpose and no other: Provided, the said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same; and provided further, that the said canals, already commenced shall be completed in seven years from the approval of this act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales, shall not be affected by that failure."

19 It was further provided by the seventh section of the said act that "said act shall take effect provided the legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the State to the several provisions and conditions thereof; and unless such expression of assent be made, this act shall be wholly inoperative."

And thereupon, in pursuance of said act of Congress, on the 22d day of December A. D. 1828, the General Assembly of the State of Ohio assented to the several provisions of said act; which said act is in the words and figures following, to wit:

"An act declaring the assent of the State of Ohio to the provisions and conditions of an act of Congress."

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the assent of the State of Ohio be, and the same is hereby expressed and declared to be given, to the several provisions and conditions of an act of Congress of the United States, approved twenty-fourth of May, eighteen hundred and twenty-eight, and entitled 'An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas Territory.'

"EDWARD KING,
"*Speaker of the House of Representatives.*
"SAMUEL WHEELER,
"*Speaker of the Senate.*

"December 22d, 1828."

That in pursuance of said agreement so entered into between the Congress of the United States and the General Assembly of the State of Ohio, the State of Ohio received and took possession of the said grant of five hundred thousand acres of land provided for in said act hereinbefore set forth, and has from time to time sold and disposed of the same, and has received from the proceeds of such sale upwards of the sum of $2,200,000. That at the time of the passage of the several acts above mentioned, the Ohio canal, extending from the mouth of the Scioto river through the State of Ohio to Lake Erie, was then located and in process of construction, with its various branches and extensions, which said canal passed through the village of Carroll, in said county of Fairfield. That afterwards, to wit, on the 8th day of February A. D. 1826, (Ohio Laws, vol. 24, p. 71,) the Lancaster Lateral Canal Company was incorporated by an act of the General Assembly of the State of Ohio, and authorized to construct and operate a canal extending from the village of Carroll to the town of Lancaster in the county of Fairfield, connecting with the Ohio canal at the said village of Carroll.

And thereupon the said company so incorporated did construct and operate the said canal between the points aforesaid until the 22d day of December, 1838, when the said Lancaster Lateral Canal Company sold and conveyed the said canal between the said points, to the State of Ohio, the said purchase being made by the board of public works, by authority conferred upon the said board by an act of the General Assembly of the State of Ohio, passed March 9, 1838, the said Lancaster Lateral Canal Company, by deed of that date, conveyed the said canal and all its rights, interests, appurtenances and fixtures connected therewith, to the State of Ohio, for the sum of $61,241, the said sum being paid to the said company by the board of public works, in pursuance of said act, out of the canal funds belonging to the

State of Ohio created by the sale of the lands granted by the United States, as hereinbefore set forth.

Afterwards, to wit, on March 7th, 1836, the General Assembly of the State of Ohio, by an act passed on that date, authorized the canal commissioners of the board of public works of the said State to extend the said Lateral canal from its terminus in the town of Lancaster, to the town of Athens, in Athens county; and the said commissioners were, by the said act, authorized to borrow on the credit of the State of Ohio $350,000, for the purpose of constructing the said canal; and afterwards the said commissioners were authorized, by an act of the General Assembly, to borrow the additional sum of $300,000, for the purpose of completing the said canal between the points aforesaid.

The plaintiff further says, that the said canal so authorized to be constructed, was completed and opened as a continuous line of canal for navigation purposes, on and prior to the first day of January, 1842. The entire purchase price of said Lateral canal, above described, and the continuation thereof from Lancaster to Athens, as well as the loan above referred to, made for the purpose of constructing the said canal, was paid out of the canal fund of the State of Ohio, which said fund was, in part at least, created by the proceeds of the sale of said lands granted to the State of Ohio as hereinbefore stated. And thereupon the said canal was constructed by the State of Ohio and became and was, and ever since has been, an extension and continuation of the Ohio canal from the village of Carroll to its termination in the said county of Athens.

22 The plaintiff further says, that ever since the construction of said canal, which is and has been known as the Hocking canal, the same has been, and still is, a public highway, which has been used for the use of the State of Ohio and the Government of the United States, in pursuance of the several acts of Congress and of the General Assembly of the State of Ohio, hereinbefore set forth.

Plaintiff further says that the said act under which the said defendant claims the right to enter upon and take possession of the canal, and to construct and operate a railroad thereon, passed May 18, 1894, and commonly known as the Earnhart act, confers no authority, power, or right upon said defendant to enter upon said lands, or to use the same for the purpose of building and operating a railroad, or for any purpose whatever.

Plaintiff says that the said act is null and void, for the following reasons:

1. Because the said act conflicts with section 10, article 1, of the Constitution of the United States, which provides that "No State shall pass any bill impairing the obligation of contracts."

2. Because said act conflicts with section 28, article 2, of the constitution of the State of Ohio, which provides that "The General Assembly shall have no power to pass laws impairing the obligation of contracts."

3. Because said act conflicts with article 13, section 1, of the constitution of the State of Ohio, which prohibits the legislature from passing any special act conferring corporate powers.

4. Because said act conflicts with section 16, article 2, of the constitution of the State of Ohio, which provides, "No bill shall contain more than one subject which shall be clearly expressed in the title."

23 5. The plaintiff further says that the said Hocking canal was at the time of said grant, and now is, worth at least from $600,000 to $700,000 for the purposes of the right of way for the construction of a railroad. That at the time of the passage of said act, the legislature of Ohio had before it a proposition from another railroad company duly incorporated under the laws of this State, having a large- capital and greater responsibility than the defendant, and which proposed to use said canal for the construction of a railway exactly as proposed by the defendant and proposed to construct the railroad in a much shorter space of time; the sum so offered by said other company being $5,000 a year larger than that for which said right of way was granted to the defendant, and at the same time it was proposed to the legislature that if such property was offered to competitive bidding the said other corporation would bid for the same an annual rental upon the basis of a valuation of $500,000.

6. The plaintiff further says that while the grant to the defendant of said canal, as hereinbefore stated, was in form a lease thereof, yet in substance and in fact it was a donation of the greater part of said property to the said defendant for its own private purposes; that said act is null and void because it is against public policy, and against the rights and interests of the people of Ohio, and it is not within the grant of legislative power given to the General Assembly by the provisions of article 2 of the constitution of Ohio.

7. The plaintiff further says, that the Lancaster Lateral Canal Company, which constructed the part of said Ohio canal between Carroll and Lancaster, acquired only the easement for the purposes of navigation along and over the lands through which said canal was located and constructed, and that by the conveyance of that part of the said property by said company to the State of

24 Ohio, the State of Ohio only acquired the same right and interest in and to that portion of the said canal which the said Lancaster Lateral Canal Company had at the time of the said conveyance.

8. The plaintiff further says, that as the said grant made by the said act of the General Assembly of May 18th, 1894, purports to convey a greater title than the State had in the said canal property, and also attempts to confer upon said defendant the right to use the said property for purposes other and different from that for which the State had the right to use the same, the said grant is excessive and greater than the General Assembly of Ohio had the power to convey, and therefore void.

The plaintiff further says that the said defendant has complied with the terms and provisions of the said act of the General Assembly of date of May 18th, 1894, and has already given bond to the State of Ohio, as provided for in said act, and the said defendant is also unlawfully making preparations to build, maintain and oper-

ate said railroad upon said line and upon said canal, and for this purpose it is unlawfully and without authority threatening to take possession of said canal and of said property and fixtures connected therewith for the sole purpose of building, maintaining and operating a railroad thereon for all time to come, without having acquired the rights and interests in the said lands and tenements belonging to the plaintiff, and without having purchased or acquired by condemnation or otherwise, the right to enter upon said lands and construct said railroad. And the said defendant is threatening to and will construct a railroad thereon which will constitute a permanent trespass upon the plaintiff's property; and will also place very large additional burdens upon said plaintiff's land by rendering the same inconvenient and difficult of access, and great and irreparable injury will be done to plaintiff in the premises, unless the defendant is restrained by an order of this court from taking possession of said canal and the said premises of plaintiff and constructing this railroad thereon.

The said plaintiff, therefore, prays the court here, that the said defendant may be enjoined from entering upon the said canal property and upon any portion of the plaintiff's premises and from constructing and operating a railroad thereon, and from doing any and all acts which are now threatened by the said defendant in the premises, and that it may be declared by the court that the said defendant is not a legally organized corporation, and that it has no power as a corporation, to build, construct, or operate a railroad on account of its failure to comply with the statutes and laws of this State as hereinbefore set forth. And that it may also be declared by the court that the act of the General Assembly of Ohio of date May 18th, 1894, under which the said defendant claims to be acting, may be declared by the court to be null and void; and that upon the final hearing the plaintiff may have a perpetual injunction restraining the defendant from doing any and all acts herein complained of.

By POWELL, RICKETTS & BLACK AND
DANIEL J. RYAN,
Attorneys for Plaintiff.

(Verification and certificate attached.)

Precipe.

(Filed March 14, 1895.)

To the clerk of said court:

Issue summons upon the above-named defendant, directed to the sheriff of Franklin county and returnable according to law. Endorse: Petition for an injunction and other equitable relief.

By DANIEL J. RYAN AND
POWELL, RICKETTS & BLACK,
Plaintiff's Attorneys.

Restraining order awarded till a motion for an injunction can be heard and decided, upon the plaintiff executing an

undertaking in the penalty of $300.00, conditioned as required by law and signed by a surety or sureties to be approved by the clerk of the courts. And it is further ordered that the said motion be heard on the 23rd day of March, 1895, at 10 o'clock a. m., or as soon thereafter as it can be heard, and the plaintiff will give the defendant written notice of the time and place for hearing said motion.

D. F. PUGH, *Judge.*

March 14th, 1895.

Demurrer to Petition.

(Filed April 17, 1895.)

The defendant demurs to the petition of plaintiff in the above-entitled case, and for the grounds thereof says that said petition does not state facts sufficient to constitute a cause of action against this defendant.

D. L. SLEEPER AND
SELWYN N. OWEN,
Attorneys for Defendant.

Entry.

(Filed April 17, 1895.)

This day came the said parties by their respective counsel and thereupon came on for hearing the motion of the said plaintiff for a temporary injunction against the said defendant, was heard upon the petition and affidavits, exhibits, and other evidence and the arguments of counsel, and was submitted to the court.

27 Upon consideration whereof, and the court being fully advised in the premises, it is considered and adjudged by the court that said motion is not well taken, and the same is therefore overruled; to which ruling and order the plaintiff at the time duly excepted.

Thereupon came the defendant and filed its demurrer to the petition of the plaintiff herein, upon the grounds that the facts stated therein are not sufficient to constitute a cause of action in favor of said plaintiff and against the defendant. Upon argument of counsel and submission to the court, it is considered that said demurrer is well taken and the same is sustained; to which ruling of the court the plaintiff at the time duly excepted.

Thereupon, the plaintiff not desiring to plead further herein, it is adjudged and considered that the said defendant go hence without day, and that it recover its costs herein against the plaintiff, whose petition is hereby dismissed; to which the plaintiff also at the time duly excepted.

And thereupon the plaintiff gave notice of his intention to appeal this case to the circuit court, and the court do fix the undertaking to be given to perfect said appeal at $100.00.

28 *Certified Transcript of Docket and Journal Entries.*

THE STATE OF OHIO, }
City of Columbus, } *ss:*

In the Supreme Court of Ohio, January Term, A. D. 1898.

In the record and proceedings then and there had and held, among other things, is the following, to wit:

JOHN J. WALSH, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND Athens Railroad Company, Defendant in Error. } # 5622. Error to the Circuit Court of Franklin County.

June 25, 1897.—Petition in error & waiver of summons filed.
" " " Circuit court transcript filed.
" " " Original papers filed.
" 26, " Papers taken by D. J. Ryan.
Aug. 4, " " returned by D. J. Ryan.
" " " Printed record filed.
" 16, " Proof of service —printed record filed.
Sept. 30, " Motion by defendant to advance and notice filed.
Oct. 5, " Journal entry:

"Motion by defendant to advance cause No. 5622 on the general docket. Oral argument requested."

"Ordered by the court that said motion be, and the same is hereby, allowed, cause advanced, and briefs to be filed within rule. Oral argument noted."

Order Book No. 15, page 379.

Dec. 18, 1897.—Plaintiff's printed brief filed.
Feb. 4, 1898.—Defendant's printed brief and proof of service filed.
" " " Printed oral argument of Levi Burgess of defe't's counsel and proof of service filed.
" 9, " Proof of service of def't's printed brief filed.
Mar. 22, " Journal entry:

29 "This cause came on to be heard upon the transcript of the record of the circuit court of Franklin county, and was argued by counsel; on consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and it hereby is, reversed at the costs of the defendant in error, to be taxed; and, rendering the judgment the court below should have rendered, it is ordered and adjudged that the said Columbus, Hocking Valley and Athens Railroad Company be, and is hereby, enjoined from entering upon the lands of the plaintiff in error described in his petition until it has condemned and paid for the additional burthen of constructing and operating a railroad on the land according to law.

It is further ordered and adjudged that the plaintiff in error recover in this court and in the circuit court his costs in this behalf expended, to be taxed.

Ordered that a special mandate be sent the court of common pleas of Franklin county to carry this judgment into execution.

Ordered that a copy of this entry be certified to the clerk of the circuit court of Franklin county 'for entry.'"

Order Book No. 16, page 34.

Mar. 29, 1898.—Mandate issued.

April 29, 1898.—Journal entry:

"On motion of the said plaintiff in error, this court doth order that it be certified and made a part of the record in this case and of the judgment rendered herein by this court at the present term thereof, to wit, on the 22nd day of March, A. D. 1898, and of the entry thereof, that in the rendition of said judgment it became and was material to the case to determine whether an act of the General Assembly of the State of Ohio entitled 'An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company,' passed May 18th, 1894, and found in vol'e 91, page 327, of the Laws of Ohio, is a law of said State and was and is of binding force and validity against the said plaintiff in error. The court order- that it further be certified that said plaintiff in error, on the hearing of said cause, claimed and asked this court to hold that the said act is in violation of and repugnant to section 10 of article I of the Constitution of the United States, which ordains that 'No State shall pass any bill impairing the obligation of contracts;' and this court orders it to be further certified that this court decided and adjudged that said act passed by the General Assembly of Ohio as aforesaid was not in violation of nor repugnant to said section 10 of article I of the Constitution of the United States and decided and adjudged that said act was and is valid and binding upon said plaintiff in error, and thereupon rendered said judgment, which is founded upon said decision of this court that said act was and is of binding force and validity against the said plaintiff in error; and this court further ordered a special mandate to carry said judgment into execution, as is shown by the entry heretofore made of said judgment and order; and it is further ordered by this court to be certified that the question of the validity of said act of the General Assembly in the particular mentioned hereinabove was drawn in question on the hearing and decision of this case as being repugnant to said section 10 of article 1 of the Constitution of the United States, and that the decision of the court was in favor of the validity of said act as against the said plaintiff in error; and it is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had."

Order Book No. 16, page 74.

31 Supreme Court of Ohio.

THE STATE OF OHIO, } ss:
City of Columbus, }

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing are all the entries in cause No. 5622, John J. Walsh *vs.* The Columbus, Hocking Valley and Athens Railroad Company, and are truly taken and correctly copied from the minute and order books of said court, and that the printed record hereto attached is a true copy of the printed record filed in this cause in this court and used in the consideration of said cause by said court.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court this twelfth day of May, A. D. 1898.

JOSIAH B. ALLEN, *Clerk.*

32

VOUGHT
v.
THE COLUMBUS, HOCKING VALLEY & ATHENS R. R. Co.

WALSH
v.
SAME.

WRIGHT
v.
SAME.

SHOTWELL
v.
SAME.

Abandonment of Hocking canal—Validity of act of May 18, 1894—A stranger to a contract cannot insist on its performance—Rights of owners of property abutting on canal—Law of contract—Constitutional law.

1. The act of the General Assembly providing for the abandonment of the Hocking canal and for leasing the same to the Columbus, Hocking Valley & Athens R. R. Co., passed May 18, 1894 (91 Laws, 327), does not confer corporate powers, nor impair the obligation of contracts, nor in any other manner conflict with the constitution of the State, and is a valid law.
2. A party cannot, for his own benefit, insist upon the performance of a contract between others and to which he is not a party or privy; nor claim relief against either of the parties
33 to such contract, for investments or improvements he may have made on the assumption that the contract would be observed.

3. Owners of lands abutting on a canal, incidentally benefited by the water it affords, or its facilities for drainage, have no property interest in these incidental benefits, and cannot, on such ground, enjoin the abandonment of the canal, or claim compensation therefor.
4. Contracts made with the board of public works or other agents of the State, for the use of the water of the canal, terminate with the abandonment of the use of the canal by the State and no action will lie against the State for damages resulting from such abandonment.
5. Lands acquired for its use by a canal company, a private corporation, organized under an act of the General Assembly before the adoption of the present constitution, as the Lancaster Lateral Canal Company, 24 Laws, 71, authorizing it to acquire lands for its use by donation, grant or appropriation, without expressing the interest or estate to be acquired thereby, revert to the owner from whom they were acquired, on the abandonment of the canal, or his successor in title. The general rule being, that where lands are acquired for a public use, an easement only is taken therein, unless the taking of a greater estate, as a fee-simple, is expressly authorized by law. And the rule is the same where it afterwards disposes of its canal to the State, which, under the act of 1825, takes a fee-simple in lands condemned by it to the uses of its canal system.
6. Where, however, the land is only abandoned by the State for canal purposes, and is at the same time leased or conveyed to a railroad company for the construction and operation of a railroad thereon, the owner is only entitled to compensation for such additional burthen thereby imposed on the land, and such damages as may result from the new use. *Hatch v. Railroad Co.*, 18 Ohio St., 92.

(Decided March 22, 1898.)

Error in such case to the circuit court of Franklin county.

The above cases have been heard and submitted together because the principal question, the validity of the act whereby the State, through its legislature, abandoned the Hocking canal for
34 canal purposes and leased it to the Columbus, Hocking Valley and Athens R. R. Co., is common to all of them. The questions arise upon a demurrer to the petition in each case. That in Vought's case is as follows: "The said plaintiff, Michael S. Vought, says, that he is a resident of the county of Fairfield, and a citizen and tax-payer of the State of Ohio. That he is now, and for some time past has been, the owner in fee-simple of a certain tract of land situated in the county of Fairfield and State of Ohio, and being parts of sections Nos. 20, 21 and 28, in Greenfield township, No. 15 and range 19, and bounded and described as follows:

On the north by the lands of George Buzzard and by the Hocking canal, on the east by the Hocking canal, and on the south by other

lands of the plaintiff, and by the lands of Zebulon Peters, Silas Peters, W. W. Donaldson, John Duddleson, and William Stanberry's heirs; and on the west by the lands of Silas Peters' heirs, John Duddleson, W. W. Donaldson, William Stanberry's heirs, M. A. Stanberry and John Ruff, containing six hundred acres more or less, all of which is in actual occupancy of plaintiff. That said lands are, and have been for many years, under a high state of improvement and used for the purposes of cultivation, and have a special value from their location, and that for the purposes of reclaiming and draining said land, he has laid thereon about seventeen miles of drain tile.

Plaintiff further says, that heretofore, to wit, on the 8th day of February, 1826 (Ohio Laws, vol. 24, page 71) the Lancaster Lateral Canal Company was incorporated by an act of the General Assembly of the State of Ohio, and authorized to construct and operate a canal extending from the village of Carroll to the city of Lancaster, connecting with the Ohio canal at said village of Carroll.

35 A copy of which said act of incorporation is hereto attached marked "Exhibit A," and made a part of this petition.

Plaintiff further says, that in and by said act, said Lancaster Lateral Canal Company was authorized to appropriate lands for the purposes set forth therein, and in and by the same the said State of Ohio reserved the right to purchase said canal at its cost price. That thereupon said canal company acquired the right to use the lands upon which it is now located, for the purpose of a canal, and did construct the same. That afterwards and on the 22d day of December, 1838, the said State of Ohio elected to purchase said canal, and did, in fact, purchase the same and received a conveyance thereof from said canal company to be held and used by the State of Ohio for the purposes of navigation. A copy of said deed is in the words and figures following, to wit:

Whereas, by an act of the General Assembly of the State of Ohio, of the ninth of March, 1838, entitled "An act to authorize the board of public works to purchase for the use of the State of Ohio, the Lancaster Lateral canal," it is, amongst other things, provided that the board of public works are thereby authorized and required, in the name and for the use of the State of Ohio, to purchase of the directors of the Lancaster Canal Company, the said canal, and hold the same for the use of the State, paying therefor the actual cost of locating, constructing and repairing the said canal, with lawful interest as the same shall be established by the oaths of the proper officers of said company, deducting therefrom the amount granted by the State in aid of said canal, with lawful interest thereon from the time of payment thereof.

36 And whereas, the said board of public works and the president and directors of said Lateral Canal Company, in conformity with the provisions of purchase above recited, have fixed and adjusted the sum to which the said company is entitled, at sixty-one thousand two hundred and forty-one dollars and four cents, being the

actual cost of locating, constructing and repairing said canal, after deducting the amount granted by the State in aid of said canal, with interest thereon as the same has been established by the oaths of the proper officers of said company.

Now know ye, that the said Lateral Canal Company, for and in consideration of the premises and for and in consideration of the said sum of sixty-one thousand two hundred and fo[illegible] one dollars and four cents, to the said company paid by the State [illegible] Ohio, and for the purpose of carrying into effect the above-recited act, doth by these presents grant, bargain, sell and convey to the State of Ohio and its assigns, in fee-simple, the said Lancaster Lateral canal, with all the fixtures and easements thereto appertaining, for the purposes of navigation, to have and to hold the same to the said State of Ohio and its assigns forever, in as full and ample a manner as the said company now hold and possess the same.

In testimony whereof, the said company has caused their common seal to be hereto affixed by John Creed, their president, on this twenty-second day of December, A. D. eighteen hundred and thirty-eight (1838).

[SEAL.] JOHN CREED, *President.*

Signed, sealed, and delivered in presence of—

W. T. MARTIN.
JAMES TAYLOR, JR.

37 THE STATE OF OHIO, } ss:
Franklin County, }

Before me, the subscriber, an acting justice of the peace within and for said county, personally appeared John Creed, president of the Lancaster Lateral Canal Company, and acknowledged the foregoing instrument of writing to be the proper act and deed of said company, for the purposes therein mentioned.

Given under my hand and seal this 22d of December, A. D. 1838.

W. T. MARTIN,
Justice of the Peace.

LANCASTER, *Dec.* 22, 1838.

At a meeting of the directors of "the Lancaster Lateral Canal Company."

Present: John Creed, president; Samuel F. McCracken, Thomas Ewing, Philemon Beecher, —— Scofield, Benjamin O'Connell, and Jacob Green.

Ordered that John Creed, president for the company, do place the common seal of the conveyance of this date, made by the company to the State of Ohio, of the Lancaster Lateral canal, and that said president acknowledge and deliver the said deed in the name of the company.

F. A. FOSTER, *Secretary.*

RECORDER'S OFFICE, FAIRFIELD COUNTY, OHIO.

This instrument of writing received December 24, 1838, and recorded 29th same month in Book No. 4, pages 357 and 358.
Attest: W. L. KING, *R.*, *F. C.*

38 Endorsement on deed.

RECORDER'S OFFICE, FAIRFIELD COUNTY, OHIO.

This deed received December 24, 1838, and recorded 29th same month in Book No. 4, page 358.
Attest: W. L. KING, *R.*, *F. C.*

Plaintiff says that many years ago the State of Ohio, through certain aid granted to the State by the United States, and by virtue of a certain compact entered into by the United States and the State of Ohio, which is hereafter more fully set forth, made certain purchases and acquired the right to extend said canal to the town of Nelsonville, in Athens county, and did complete and extend the same, and the same is known and commonly called the Hocking canal, and the east line of plaintiff's said lands is in the center of said canal. The plaintiff further says that the said Hocking canal extends from the village of Carroll, in Fairfield county, and the Ohio canal, through the counties of Fairfield, Hocking and Athens to the village of Nelsonville, in the said last-named county; and the same has since its construction been a part of the canal system of the State of Ohio, and an extension of the Ohio canal, and the State of Ohio is the owner of and in possession of said canal, which is now in use for navigation and other purposes hereinafter set forth.

The plaintiff further says, that the said defendant, The Columbus, Hocking Valley and Athens Railroad Company, on the 12th day of April, 1894, filed with the secretary of state its articles of incorporation in said name, which articles of incorporation were
39 then and there duly recorded, and that the principal office of said company, fixed by said articles of incorporation, is at the city of Columbus, in the county of Franklin, in said State. Said corporation was organized for the purpose of building and operating a railroad from the city of Columbus, in the county of Franklin, and extending through the counties of Franklin, Fairfield, Hocking and Athens, all in the State of Ohio, the said corporation being authorized to exercise such powers, rights, privileges and franchises only as are provided for and conferred by the general laws of the State of Ohio, regulating the organization and incorporation of railroad companies.

Plaintiff further says that said defendant, since the 18th day of May, 1894, has been and still is claiming the right, privilege and franchise of entering upon, taking possession of and controlling the Hocking canal, above described, and especially that portion extending through the lands of plaintiff, above described, including all the property, rights, interests and appurtenances connected with said Hocking canal, between the points above named. The said defendant claims the right, privilege and franchise of taking possession,

controlling said property and constructing and operating a railroad along and over the said canal, by virtue of an act of the General Assembly of the State of Ohio, passed on the 18th day of May, A. D. 1894. Said act is in words and figures following, to wit:

S. B. An act No. 315.

To provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley and Athens Railroad Company.

40 SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking canal, from its junction with the Ohio canal in the village of Carroll, Fairfield county, to its southeastern terminus in the village of Nelsonville, Athens county, be and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

SEC. 2. There is hereby granted the right, franchise, and privilege of constructing, maintaining and operating over, upon and along the Hocking canal and property of the State of Ohio adjacent thereto, a railroad with single or double tracks, side tracks, switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley and Athens Railroad Company, its successors and assigns for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the treasurer of the State of Ohio, on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

SEC. 3. Said installment of fifty thousand dollars shall be paid into the State treasury before the construction of said railroad is begun, and for the remaining installments of rental the State of Ohio shall have the first lien upon said railroad, together with its switches, side tracks, bridges, and other structures erected on said property of the State of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said
41 Columbus, Hocking Valley and Athens Railroad Company shall further execute unto the State of Ohio, to be approved by the auditor of State, the secretary of state and attorney general, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars conditioned that the said company will faithfully build said railroad in compliance with the conditions and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the State of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond shall be executed and filed with the secretary of state within ten days after the passage of this act.

SEC. 4. In consideration of the payment aforesaid, said railroad company, its successors and assigns, shall have the exclusive right during the term aforesaid to use and occupy the property aforesaid

or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property-holders along said canal, and shall hold the State harmless from all loss or damage resulting to such property-holders by reason of the construction and operation of said railroad.

Provided that when said railroad, its successors and assigns cease to use said canal for railroad purposes, said canal property shall revert to the State for canal purposes.

SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this State.

SEC. 6. The work of constructing said railroad shall be
42 commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

SEC. 7. This act shall take effect and be in force from and after its passage.

LEONIDAS H. SOUTHARD,
Speaker pro Tem. of the House of Representatives.
ANDREW L. HARRIS,
President of the Senate.

Passed May 18, 1894.

The said Hocking Canal property above described was acquired by the State of Ohio by virtue of the acts relating to the Lancaster Lateral Canal Company, above set forth, and also by virtue of certain acts of the Congress of the United States, and by the General Assembly of the State of Ohio, under and by virtue of certain agreements entered into by and between the United States and the State of Ohio, as hereinafter set forth. That between the 23d day of February, 1820, and the 8th day of February, 1825, the General Assembly of the State of Ohio presented to the Senate and House of Representatives of the United States memorials and resolutions in which were set forth the advantgages which the United States would derive from the construction of certain canals, and particularly the Ohio canal, extending from the Ohio river at the mouth of the Scioto river to Lake Erie, and requesting the Congress of the United States to grant to the State of Ohio aid in the construction of said canal and extensions thereof, which might thereafter be made.

And thereupon, in response to said resolutions and memorials, on the 24th day of May, 1828, the Congress of the United States passed an act entitled "An act to aid the State of Ohio in extending
43 the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State to aid in the construction of said canals authorized by law," the fifth section of which act is in the words and figures following, to wit:

"SEC. 5. And be it further enacted, That there be and hereby is granted to the State of Ohio, five hundred thousand acres of the land owned by the United States, within the State of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, created by said State in the con-

struction of the canals within the same, undertaken under the authority of the laws of the said State now in force, or that may hereafter be enacted, for the extension of canals now making; which lands, when selected, shall be disposed of by the legislature of Ohio, for that purpose and no other: Provided, the said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same: And provided further, that the said canals, already commenced shall be completed in seven years from the approval of this act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales, shall not be affected by that failure."

It was further provided by the seventh section of the said act that "said act shall take effect provided the legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the State to the several provisions and conditions
44 thereof; and unless such expression of assent be made, this act shall be wholly inoperative."

And thereupon, in pursuance of said act of Congress, on the 22d day of December, A. D. 1828, the General Assembly of the State of Ohio assented to the several provisions and conditions of said act; which said act is in the words and figures following, to wit:

"An act declaring the assent of the State of Ohio to the provisions and conditions of an act of Congress." (See page 319.)

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the assent of the State of Ohio be, and the same is hereby expressed and declared to be given, to the several provisions and conditions of an act of Congress of the United States, approved twenty-fourth of May, eighteen hundred and twenty-eight, and entitled, 'An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas Territory.'

"EDWARD KING,
"*Speaker of the House of Representatives.*
"SAMUEL WHEELER,
"*Speaker of the Senate.*

"December 22d, 1828."

That in pursuance of said agreement so entered into between the Congress of the United States and the General Assembly of the State of Ohio, the State of Ohio received and took possession of the said grant of five hundred thousand acres of land provided for in said
45 act hereinbefore set forth, and has from time to time sold and disposed of the same, and has received from the proceeds of such sale upwards of the sum of $2,200,000. That at the

time of the passage of the several acts above mentioned, the Ohio canal, extending from the mouth of the Scioto river through the State of Ohio to Lake Erie, was then located and in process of construction, with its various branches and extensions, which said canal passed through the village of Carroll, in said county of Fairfield. And that afterwards, on the date hereinbefore mentioned, the said Lancaster Lateral canal was purchased by the State of Ohio for the sum of $61,241, the said sum being paid to the said Lancaster Lateral Canal Company by the board of public works, in pursuance of said act, out of the canal funds belonging to the State of Ohio, derived from and created by the sale of the lands granted by the United States, as hereinbefore set forth.

Afterwards, to wit, on March 7, 1836, the General Assembly of Ohio, by an act passed on that date, authorized the canal commissioners of the board of public works of the said State, to extend the said Lateral canal from its terminus in the town of Lancaster, to the town of Athens, in Athens county; and the said commissioners were, by the said act, authorized to borrow on the credit of the State of Ohio $350,000, for the purpose of constructing said canal; and afterwards the said commissioners were authorized, by an act of the General Assembly, to borrow the additional sum of $300,000, for the purpose of completing the said canal between the points aforesaid.

The plaintiff further says, that the said canal so authorized to be constructed, was completed and opened as a continuous line
46 of canal for navigation purposes, on and prior to the first day of January, 1842. The entire purchase price of said Lateral canal, above described, and the continuation thereof from Lancaster to Athens, as well as the loan above referred to, made for the purpose of constructing said canal, was paid out of the canal fund of the State of Ohio, which said fund was, in part at least, created by the proceeds of the sale of said lands granted to the State of Ohio as hereinbefore stated. And thereupon the said canal was constructed by the State of Ohio and became and was, and ever since has been, an extension and continuation of the Ohio canal from the village of Carroll to its termination in the said county of Athens.

The plaintiff further says, that ever since the construction of said canal, which is and has been known as the Hocking canal, the same has been, and still is, a public highway, which has been used for the use of the State of Ohio and the Government of the United States, in pursuance of the several acts of Congress, and of the General Assembly of the State of Ohio, hereinbefore set forth.

Plaintiff further says, that said canal cuts off from plaintiff's said land all the drainage from lands lying east therefrom, and the waters falling upon said lands east of plaintiff, as aforesaid, all run and flow into said canal, and plaintiff has provided for the drainage of all the water falling upon his said lands by means of tile drains, as before mentioned.

Plaintiff further says that the abandonment of the canal and the construction of said railroad will place increased burdens upon his

said lands; will subject his said lands to the flow of waters
47 from the east, which since the year 1836 have been intercepted by said canal, and subject them to overflow and render them unfit for the purposes of cultivation and greatly less valuable.

The plaintiff further says that the said act under which the said defendant claims the right to enter upon and take possession of the said canal, and to construct and operate a railroad thereon, passed May 18, 1894, confers no authority, power, or right upon said defendant to enter upon said lands and to use the same for the purposes of building and operating a railroad, or for any other purpose.

Plaintiff says that the said act is null and void, for the following reasons:

1. Because the said act conflicts with section 10, article 1, of the Constitution of the United States, which provides that "No State shall pass any bill impairing the obligation of contracts."

2. Because said act conflicts with section 28, article 2, of the constitution of the State of Ohio, which provides that "The General Assembly shall have no power to pass laws impairing the obligation of contracts."

3. Because said act conflicts with article 13, section 1, of the constitution of the State of Ohio, which prohibits the legislature from passing any special act conferring corporate powers.

4. Because said act conflicts with section 16, article 2, of the constitution of the State of Ohio, which provides, that "No bill shall contain more than one subject which shall be clearly expressed in the title."

5. The plaintiff further says that the said Hocking canal was at the time of said grant, and now is, worth at least from $600,000 to $700,000 for the purposes of the right of way for the construc-
48 tion of a railroad. That at the time of the passage of said act, the legislature of Ohio had before it a proposition from another railroad company duly incorporated under the laws of this State, having a larger capital and greater responsibility than the defendant, and which proposed to use said canal for the construction of a railway exactly as proposed by the defendant and proposed to construct the railroad in a much shorter space of time; the sum so offered by said other company being $5,000 a year larger than that for which said right of way was granted to the defendant, and at the same time it was proposed to the legislature that if such property was offered to competitive bidding the said other corporation would bid for the same an annual rental upon the basis of a valuation of $500,000.

6. The plaintiff further says that while the grant to the defendant of said canal as hereinbefore stated, was in form a lease thereof, yet in substance and in fact it was a donation of the greater part of said property to the said defendant for its own private purposes. That said act is null and void because it is against public policy, and against the rights and interests of the people of Ohio, and it is not within the grant of legislative power given to the General Assembly by the provisions of article 2 of the constitution of Ohio.

7. The plaintiff further says that the Lancaster Lateral Canal Company, which constructed the part of said Ohio canal between Carroll and Lancaster, acquired only the easement for the purposes of navigation along and over the lands through which said canal was located and constructed, and that by the conveyance of that part of the said property by said company to the State of Ohio, the State of Ohio only acquired the same right and interest in
49 and to that portion of the said canal which the said Lancaster Lateral Canal Company had at the time of its said conveyance.

8. The plaintiff further says that as the said grant made by the said act of the General Assembly of May 18, 1894, purports to convey a greater title than the State had in the said canal property, and also attempts to confer upon said defendant the right to use the said property for purposes other and different from that for which the State had the right to use the same, the said grant is excessive and greater than the General Assembly of Ohio had the power to convey and therefore void.

The plaintiff further says that the said defendant is about to comply with the terms and provisions of the said act of the General Assembly of date of May 18, 1894, and has already given bond to the State of Ohio, as provided for in said act, and the said defendant has made payment of the money provided to be paid by the said defendant in said act, and the said defendant is also unlawfully making preparations to build, maintain and operate said railroad upon said line and upon said canal, and for this purpose it is unlawfully and without authority threatening to take possession of said canal and all said property and fixtures connected therewith for the sole purpose of building, maintaining and operating a railroad thereon for all time to come, which, if consummated, will constitute a permanent injury and destruction of plaintiff's property and rights; that the said defendant, by the destruction of said canal, will irreparably injure the lands of plaintiff, hereinbefore set forth, and will destroy the value of the drainage system which said plaintiff has constructed upon his land, and will also place
50 very large additional burdens upon said plaintiff's lands, and great and irreparable injury will be done the plaintiff in the premises, unless the defendant is restrained from taking possession of said canal and constructing the railroad thereon.

The said plaintiff, therefore, prays the court here, that the said defendant may be enjoined from entering upon said canal property and taking possession of the same, and from doing any of the acts which are now threatened by the said defendant in the premises, and especially that the said act of the General Assembly of Ohio of date May 18, 1894, under which the said defendant claims to be acting, may be declared by the court to be null and void, and that upon a final hearing the plaintiff may have a perpetual injunction restraining the defendant from doing any and all the acts herein complained of, and for all other and proper relief in the premises.

The facts by which each of the others are distinguished, will be noticed in the opinion. Briefly they may be stated as follows:

Shotwell claims a contract with the State for the use of water from the canal with which to sprinkle the streets of Logan, and which he claims the act violates.

Wright claims a contract with the State to enlarge and forever maintain a dam across the Hocking river at a point above his grist mill, near Logan, so as to furnish a sufficient supply of water both for the canal and his grist mill.

Walsh claims to own land on both sides of and adjoining what was known as the Lancaster Lateral canal, now a part of the Hocking canal. That, as to this part of the Hocking canal, the State has simply an easement in the property. That on the abandon-
51 ment of the canal, through his premises, the land reverted to him, and that the State has no power to lease or grant it to others, or place additional burthens upon it. In this respect his claim is similar to Vought's.

The cases were appealed to the circuit court, and there submitted on the demurrer to the petition in each case. The court sustained the demurrer and dismissed each case. The action of the court in this regard is assigned for error.

R. A. Harrison, J. B. Foraker, T. E. Powell, and *D. J. Ryan,* for plaintiffs in error.

The act is unconstitutional and void, because it conflicts with section 1 of article 13, of the constitution of Ohio, which provides: "The General Assembly shall pass no special act conferring corporate power."

This provision has been construed by our supreme court to mean:

First. No corporation shall be created by special act.

Second. Corporate powers shall not be conferred upon any corporation created under the general laws by special act.

Third. No additional corporate power shall be conferred upon a corporation created under the general laws by a special act of the General Assembly.

While it is true that the Columbus, Hocking Valley & Athens Railroad Company was incorporated under the general laws of this State, still if any additional corporate power has been conferred upon it by this special act, then such act is in conflict with the above constitutional provision, and void.

52 This act confers upon this railroad company the exclusive right to use and operate a railroad over this public highway.

In the case of *Railroad Company v. Railroad Company,* 36 Ohio St., 239, it was held that a municipal corporation could not confer upon a street railroad the exclusive right to the use of the streets.

This act enlarges the corporate power of this railroad company in three respects:

First. It grants to this corporation the right to acquire and operate a railroad by lease alone.

Second. It confers upon this corporation the power to divert a public highway from the purposes for which it was originally constructed, and to *to* use it, exclusively for purposes entirely different.

Third. It grants to this corporation the exclusive right to use and control this highway, a power which the legislature cannot confer upon any corporation whatever. If the Hocking canal had remained a public highway for navigation purposes, the legislature of Ohio could not confer upon any corporation the exclusive right to operate boats over the line of the canal, thereby giving it a monopoly of the transportation business.

The following authorities are relied upon to support our proposition that this act confers corporate power. *Atkinson et al. v. M. & C. R. R. Co.*, 15 Ohio St., 21; *State ex rel. v. Cincinnati*, 20 Ohio St., 18; *State ex rel. v. Cincinnati*, 23 Ohio St., 445; *State v. Mitchell*, 31 Ohio St., 592; *State v. Constantine*, 42 Ohio St., 442; *State v. Pugh*, 43 Ohio St., 98; *State v. Anderson*, 44 Ohio St., 248; *Commissioners v. State ex rel. Brockmann*, 50 Ohio St., 653; *City v. Spring Valley Water Works*, 48 Cal., 509.

The act in question violates section 10 of article 1, of the
53 Constitution of the United States, which ordains that "No State shall pass any bill impairing the obligation of contracts."

The act of Congress approved May 24, 1828, by which the United States then granted to the State of Ohio 500,000 acres of the lands owned by the United States within the State, for the purpose and upon the conditions in the act contained, and the act of the General Assembly of Ohio passed December 22, 1828, declaring the assent of the State of Ohio to the provisions and conditions of said act of Congress, constitute a contract.

A grant is an executed contract. If a law is in its nature a contract and rights have become established thereunder, it cannot be repealed. *Fletcher v. Peck*, 6 Cranch, 88.

A compact between the United States and States to secure rights of way to carry United States mails, was construed in *Searight v. Stokes*, 3 How., 151; and *Neil v. Ohio, id.*, 720.

In 1831 this State passed an act proposing, with the assent of Congress, to take under its care that portion of the Cumberland road within its limits, and to apply the tolls to the repair of the road, and containing a proviso exempting toll for the passage of any stage or coach conveying the property of the United States and persons in its service. Congress passed a law assenting to this act.

In 1831, Pennsylvania, about two months after the passage of the law of Ohio, passed an act similar.

In 1836 the legislature of Pennsylvania passed an act imposing a toll upon carriages carrying the mail of the United States over that part of the Cumberland road within the State. The court held this act to be in conflict with the compact between the State and the United States arising from said act of 1835, under which the
54 State took possession of the road. *McGhee v. Mathis*, 4 Wall., 143; *Lake Superior R. R. Co. v. United States*, 3 Otto, 442; *Green v. Biddle*, 8 Wheaton, 1; *State ex rel. v. Railway Co.*, 37 Ohio St., 153.

A contract of a State with another State, or with an individual, whether it assumes the form of a grant or not, is a contract within

the prohibition of the Constitution of the United States. *New Jersey v. Wilson*, 7 Cranch, 164; *Fletcher v. Peck*, 6 *id.*, 87; *Winter v. Jones*, 10 Georgia, 190; *Adams v. Hackett*, 7 Foster, 294; *Providence Bank v. Billings*, 4 Pet., 560; *Woodruff v. Trapnall*, 10 How., 190; *Wabash, etc., Co. v. Beers*, 2 Black, 448.

It is now quite settled that the clause as to the constitutional inviolability of contracts. is to be construed by itself, so far, at least, that there is no contract which a State law can effect which is not within the constitutional prohibition. Hence a contract between two States, or a contract between a State and an individual, is a contract within the sense of this clause and for the purpose of protecting its inviolability. *De Witt v. Harvey*, 4 Gray, 499. The threatened action of the defendant will disturb the vested rights of the plaintiff as alleged in his petition. *Street Railway v. Cumminsville*, 14 Ohio St., 523; *Roberts v. Easton*, 19 Ohio St., 78; *Railway Co. v. Lawrence*, 38 Ohio St., 41.

An injunction will be granted for the protection of an easement or a servitude in water, and an easement in water, acquired by prescription, is as absolute as any other right, and equity will restrain its violation when such violation is productive of any serious injury. *Hulme v. Shreve*, 3 Green (N. J.), Ch., 116; *Repley v. Welsh*, 23 Cal., 452; *Sheboygan v. S. R. R. Co.*, 21 Wis., 667; *Owen v. Field*, 12 Allen, 357; *Wilcox v. Wheeler*, 47 N. H., 488.

55 An injunction is the only remedy by which, in such cases as this, the property-owner cannot obtain the protection guaranteed to him by section 19 of the "bill of rights" of this State.

The act providing for the abandonment of the Hocking canal and the leasing of the same for railroad purposes is invalid, null and void, as claimed in plaintiff's petition, for the reason that the legislature purports to grant a greater title in the Hocking canal to the grantee than the State of Ohio possesses.

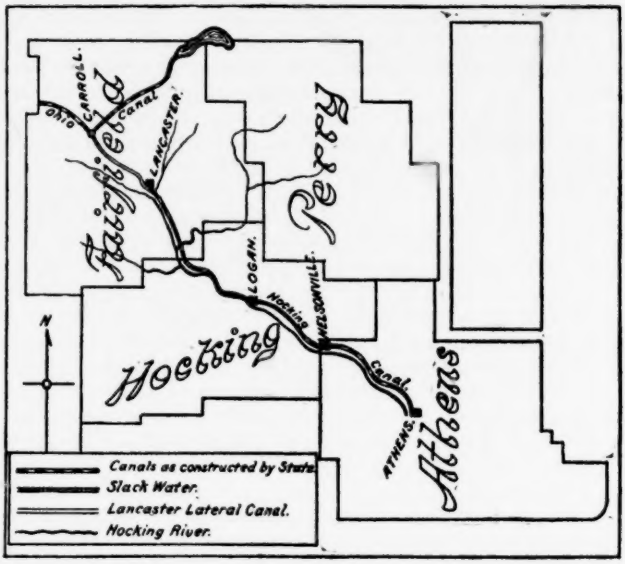
The title to the State of Ohio in that part of the Hocking canal between Carroll and Lancaster, is not a title in fee-simple, as is the title to the remainder of the canal property of Ohio, including the remaining portions of the Hocking canal beyond Lancaster, it is simply an easement for canal purposes, under the different acts pleaded in the plaintiff's petition.

The State of Ohio came into possession of that part of the Hocking canal which lies between Carroll and Lancaster, by purchase from the Lancaster Lateral Canal Company, a private corporation which constructed the canal under the authority of its charter as received from the Ohio legislature.

The State of Ohio, under an act entitled "An act to provide for the general improvement of the State of Ohio by navigable canals," passed February 4, 1825 (see 2 Chase, page 1475, section 8), constructed the general canal system of the State, and under said act had authority to take land by purchase or gift, and also to appropriate land that was necessary in the construction and maintenance of said canal system. The title to all land appropriated

56 under this act which vested in the State of Ohio, was expressly provided by that statute to be a fee-simple title.

Map Showing Lancaster Lateral and Hocking Canals.



But the title which the State of Ohio acquired in that part of the Hocking canal which lies between Carroll and Lancaster, is an entirely different title from that which it acquired in lands appropriated under the general canal act of 1825. (See volume 24, Ohio Laws, 71.) By this act of incorporation, the Lancaster Lateral Canal Company was constituted and declared a body corporate and politic "for the purpose of making a navigable canal from the town of Lancaster to such point of the Ohio canal as shall be found most eligible." *Oregon R'y & Nav. Co. v. The Oregonian R'y Co., Limited.* (See 130 U. S., page 1.)

57 Afterwards, to wit, March 9, 1838, by authority of an act entitled "An act to authorize the board of public works to purchase for the use of the State of Ohio, the Lancaster Lateral canal," said Lancaster Lateral canal was purchased by the State of Ohio, and, thereupon, became in fact and in law a part and parcel of what is now known as the Hocking canal, and is embraced in the act of abandonment in question.

The act of incorporation of the Lancaster Lateral Canal Company specially provided that the title which this company should have in lands which they appropriated for the purpose of constructing their canal should be "to the extent and for the purpose set forth in or contemplated by this act." This question has been determined in Ohio. The Warren County Canal Company incorporated by a special act of the legislature, February 22, 1830. Volume 28, Ohio

Laws, 124, and volume 34, Ohio Laws, 135, *Corwin v. Cowan*, 12 Ohio St., 629.

When the State of Ohio abandoned the part of the Hocking canal which it had originally secured from the Lancaster Lateral Canal Company as it does by the first section of the act in question, it ceases to have any further title in said property.

Where the State has no title to the thing granted, the grant is absolutely void. *Polk's Lessee v. Wendell et al.*, 5 Wheat. Rep., 293.

Legislative grants are not warranties, and the rule of the common law must be applied to them, that no estate passes to the grantee except what was in the grantor at the time. *Rice v. Railroad Company*, 1 Black's Report, U. S. Supreme Court.

Where the State makes a grant and purports to give a
58 greater title than she possesses, the grant is void. This doctrine prevails from the common law wherein grants from the Crown can be avoided in three ways: (1) Where the grant professes to give a greater estate than it possessed in the subject-matter of the grant; (2) where the same estate, or part of the same estate, has already been granted to another; and (3) where the Crown has been deceived in the consideration expressed in the grant. Am. and Eng. Ency. of Law, vol. 9, page 45, "Grants."

A purchaser from the State takes such title as the State is authorized to convey. *Webster v. Clear*, 49 Ohio St., 392; *New Orleans v. United States*, 10 Pet., 731; *Governeur's Heirs v. Robertson*, 11 Wheat., 332.

The grant of this property to the defendant for the use and purpose of a railroad being void, as we claim, for the reason that the legislature has no right to make such a grant, the plaintiff may appeal to the court by injunction to preserve his rights where such alleged grant would interfere with them. *Le Clercq et al. v. Trustees of Gallipolis*, 7 Ohio, 221; *Reynolds' Widow v. Commissioners of Stark County*, 5 Ohio, 204; Cooley on Con. Lim., 211.

How this grant should be construed: *Slidell v. Granjean*, 111 U. S., 437; *Charles River Bridge v. Warren*, 11 Pet., 420; *Dubuque & Pacific R. R. Co. v. Litchfield*, 23 How., 66; The Delaware R. R. Tax, 18 Wall., 206.

Public grants are to be construed strictly, not extended by implication. *Jackson v. Lamphire*, 3 Pet., 280; *Beaty v. Knowler*, 4 Pet., 152; *Providence Bank v. Billings*, 4 Pet., 514; *United States v. Arredondo*, 6 Pet., 736.

Grants to corporations are to be construed strictly against
59 the corporation and in favor of the public. *Rice v. R. R. Co.*, 1 Black, U. S., 359.

D. L. Sleeper, Selwyn N. Owen, C. H. Grosvenor, and *John J. Stoddart* for defendant in error.

1. The State has the right to abandon any portion of her canals, and to authorize a change of use from one to another of a like kind, and that property used for canal purposes, by consent of the legislature, may be used for railroad purposes, both being public highways for the transportation of persons and property, and dif-

fering only in the method of transportation. *Fox v. Cincinnati*, 104 U. S., 783; *Hatch v. Railroad Co.*, 18 Ohio St., 92; *Hubbard v. Toledo*, 21 Ohio St., 379; *Malone v. Toledo*, 28 Ohio St., 643; *Elevator Co. v. Cincinnati*, 30 Ohio St., 629; *Fox v. Cincinnati*, 33 Ohio St., 492; *Fauger v. Board of Public Works*, 42 Ohio St., 607; *Canal Co. v. Commissioners*, 27 Ohio St., 14; *McComb v. Stewart*, 40 Ohio St., 647; *People v. Kerr*, 27 N. Y.; Cooley's Const. Lim., 554; *Bret v. Wabash & Erie Canal Co.*, 25 Ind., 409; *Tuckahoe Canal Co. v. Tuckahoe Railroad Co.*, 11 Leigh, 42; Cooley's Const. Lim., 102, 104, 105, 216 and 218; Cook on Stocks, 923; Wood on Railroads, 937; 34 Maryland, 463; *Rexford v. Knight*, 10 N. Y., 308; *Halderman v. R'y Co.*, 50 Pa. St., 425; *Craig v. Mayor*, 53 Pa. St., 427; *Robinson v. Company*, 72 Pa. St., 316; *Mason v. Company*, 9 Bassell (U. S.), 239; *Nelson v. Fleming*, 56 Ind., 310; *Waterworks v. Burkhart*, 41 Ind., 364; *State v. Company*, 37 Ohio St., 174; *State v. Snook*, 53 Ohio St., 521; *State v. Pennsylvania Co.*, 53 Ohio St., 189; *Richards v. Cincinnati*, 31 Ohio St., 506.

If an additional burden has been placed upon the premises of the plaintiffs, Walsh and Vought, by the building of the railroad
60 instead of the canal, they have an ample remedy at law, and could proceed under section 6448 of the Revised Statutes of Ohio, to compel such appropriation and payment. A court of chancery will not interfere by injunction when there is an ample remedy at law. 10 Am. & Eng. Ency. of Law, 783; *Glenn v. Fowler*, 8 Gill and J. (Md.), 340; *Hulse v. Wright*, Wright's Rep., 61; *McComb v. Stewart*, 40 Ohio St., 663.

2. The contract does not impair the obligation of any contract between the State and nation, or between the State and any of its citizens.

We have no difference with counsel for plaintiffs in error upon the decisions quoted in their brief as to the binding force of agreements between the national and State governments such as that in 3 Howard, 151. Those cases decide as to the effect of grants with a proviso and acceptance, as between the two governments—the parties to the contract. In the case at bar neither of the parties to the contract are complaining. The complaint here comes from one who complains because the parties to the contract are satisfied, and his complaint is not for their benefit but solely for his own private benefit.

The statutes conferring upon the agents of the State the power to grant the privilege to use the surplus water of the canal only conferred the power to so contract for its use for hydraulic purposes, it did not confer the authority to have the water for sprinkling purposes. Laws of 1841, page 74; *The State ex rel., etc., v. Railway Co.*, 37 Ohio St., 174.

Mr. Wright nowhere directly alleges that the agents of the State agreed that water should forever be taken from the canal to run the mill. If, however, such agreement had been made it would
61 not be binding on the State, because such agreement would likewise have been beyond the power of the State's agents. *Elevator Co. v. Cincinnati*, 30 Ohio St., 630.

The abandonment of her public canals, by the State, creates no liability on her part to respond in damages resulting therefrom to parties holding leases of "surplus water" under the act of March 23, 1840. *Hubbard v. City of Toledo*, 21 Ohio St., 379; *Cooper v. Williams*, 4 Ohio, 253; *Buckingham v. Smith*, 10 Ohio, 288; *Fox v. Cincinnati*, 33 Ohio St., 492, affirmed in 104 U. S., 783; *State ex rel. v. Board Public Works*, 42 Ohio St., 615; *Erkenbrecher v. Cincinnati*, 2 C. S. C. R., 412; *Haldoman v. Pa. R. R. Co.*, 50 Pa. St., 440.

3. The act does not confer corporate powers; but if it did and is a general law it is still valid.

The act purports to grant to the defendant the right, franchise, and privilege of constructing, maintaining, and operating over and along the Hocking canal and the property of the State of Ohio, adjacent thereto, a railroad, with single or double tracks, side tracks, switches, bridges, stations, and other structures usual and incidental to the operation of a railroad, and to the successors and assigns of the defendant for the term of ninety-nine years renewable forever, for the consideration named in the act.

Beyond these provisions no power is granted that an individual may not exercise. Surely the power to pay $50,000 down and $10,000 annual rental is not a corporate power. Anybody who has the money can do that without resolving himself or themselves into a corporation or assuming corporate powers or franchises.

We must not forget that the defendant was a railroad cor-
62 poration when the State first began to deal with it. We must not forget that every pretended power which the act purports to grant to it was already possessed by it. *Sims v. Street Railroad Co.*, 37 Ohio St., 556; *Commissioners v. Rosche Bros.*, 50 Ohio St., 103.

4. That section 16 of article II, of the State constitution, which provides that "no bill shall contain more than one subject," is directory merely, and its violation does not vitiate the act. *State ex rel. v. Covington*, 29 Ohio St., 102; *Pim v. Nicholson*, 6 Ohio St., 176; *Miller v. State*, 3 Ohio St., 475.

5. That it is the sole province of the legislature to determine the value of the property of the State, and the adequacy of the consideration therefor, and its acts in that regard are not proper subjects for judicial review.

The court will not inquire into the motives of the legislature, or whether an act is just or unjust, politic or impolitic, provident or improvident. Cooley Const. Lim., 220; *Wire Co. v. Brown*, 64 Ia., 275; *Probasco v. Raine*, 50 Ohio St., 378.

The long line of decisions above referred to clearly establishes the doctrine that the legislature has full and ample power to abandon her canals and authorize their use for street or railway purposes. This question has become "*stare decisis.*" *Dugan v. Campbell*, 1 Ohio, 119; *Smith v. Harmoning*, 42 Ohio St., 254; *Kearney v. Buttles*, 1 Ohio St., 362.

6. The title of the State in the portion of the canal acquired from the Lancaster Lateral Canal Company is not an easement for transportation by canal only, but is a fee title held for the general pur-

poses of a public highway for transportation and commerce. 23 Ohio Laws, 56, section 8; *Ohio ex rel. v. Railway Co.*, 53 Ohio St., 243; *State of Ohio v. Snook et al.*, 53 Ohio St., 531.

63 Beginning with the 5 Ohio, 115, and ending with the 53 Ohio St., 521, the general trend of the decisions has been in the direction of the principles announced in the last case. No other conclusion could logically follow. There can be no distinction made between a strip of land acquired upon which to build a portion of the canal system and a strip of land acquired for a portion of the same system upon which a canal has been already built. The object of the acquisition is the same in both cases. The thing ultimately produced is the same, namely, an addition to the canal system. *Rexford v. Knight*, 11 N. Y., 308; *Halterman v. Penn. R. R. Co.*, 50 Pa. St., 425; *Craig v. Mayor*, 53 Pa. St., 477; *Robinson v. Penn. R. R. Co.*, 72 Pa. St., 316; *Mason v. Lake Erie, etc., R'y Co.*, 9 Biss. (U. S.), 239; *Nelson v. Flemming*, 56 Ind., 310; *Water Works Co. v. Burkhart et al.*, 41 Ind., 364.

A land-owner alleging that the land was taken and held wrongfully without his consent and against his protest has his only remedy for the land taken and for injury to his other land under section 6448, Revised Statutes (69 Ohio Laws, 88), to compel an appropriation. *Hatry v. P. & Y. R'y Co. et al.*, I. C. C., 428.

Where, however, the highway is occupied by the company under an agreement with the public authorities having control of it, the owner may compel the institution of proceedings for its condemnation under section 6448, Revised Statutes. *Railroad Company v. Robbins*, 35 Ohio St., 531; *Railroad Company v. Williams, supra; Railroad Company v. O'Harra*, 48 Ohio St., 353.

7. That the allegations of the petition inconsistent with, or controverted by law, are not admitted to be true by the demurrer,

64 and that the 5th, 6th, 7th and 8th propositions in the plaintiff's general statement are not merely questions of fact. *State v. Archibald*, 52 Ohio St., 1.

The plaintiffs have no vested rights growing out of advantages arising from the fact that the canal joins their lands.

Our claim is that no citizen had the right to go upon the State property within the lines of the right of way of the canal or to use any part of the State's property within this line, for individual use or for private purposes, that the statutes of this State prohibited everything from trespassing on said property, by penal statutes in force ever since the canal had been in existence. *White v. Ohio*, 14 Ohio, 468; Revised Statutes, sections 218–'70.

The privilege granted to any private citizen was merely a matter subservient to the use for which the right of way was originally acquired and was only by sufferance.

Canals do not come under the terms "ways" or "public lands." *State ex rel v. Railway Co.*, 37 Ohio St., 175.

It has been decided by this court that two classes of benefits inure from the construction of the canal, "general and accidental." *Cooper et al. v. Williams*, 4 Ohio, 253.

This decision has been notice for many years, that no vested

rights could be acquired in any of the matters mentioned in the decision. *Buckingham v. Smith et al.*, 10 Ohio, 288.

There can be no claim for damages on account of the loss of the convenience of watering farm stock at the canal. *Hatch v. Railroad Company*, 18 Ohio St., 122.

MINSHALL, *J.*:

The grounds on which the act in question is claimed to be
65 unconstitutional are stated in the answer. They are, 1. That it is a special act conferring corporate power. 2. It impairs the obligation of contracts. 3. It contains more than one subject of legislation. It is sufficient to say in regard to the latter, that it has been permanently settled by the decisions of this court, that the provisions of the constitution on which this objection is placed, is directory and not mandatory; and that a law cannot be held invalid because it contains more than one subject of legislation.

With regard to the first ground: If this act were the only source of the company's authority to be a corporation and construct a railroad, the validity of the act might well be questioned. The company, however, is one organized under the general laws of the State, and has the same corporate powers and franchises, possessed by railroad corporations in general. Hence, its corporate powers and franchises are not conferred on it by this act; they are derived from the general law; and the provisions of the act in this regard are superfluous and cannot of themselves impair the validity of the act. As a railroad corporation it possessed, by general law, the power to build a railroad between the termini named, and to acquire by purchase or condemnation a right of way for its road, and other property necessary for its operation; and if it were competent to the State to abandon its canal and dispose of it to any purchaser, as has been frequently held, it was competent to the company to purchase it for the uses of its road. The transaction authorized by the law was simply an abandonment of the Hocking canal by the State, and the disposition of it to an existing railroad corporation for a consideration agreed on. The fact that the State through its
66 legislature saw fit to deal with this company rather than some other one, or did not offer the property at a competitive bidding, or might have made a better bargain, cannot affect the validity of the law. Such matters must necessarily be left to the discretion of the legislatare, acting for the State in the disposition of its property. There is no constitutional provision limiting its power in this regard. For its wisdom and integrity in exercising this power, the legislature is responsible to the people and not to the courts.

The case of the *City and County of San Francisco v. Water Works Co.*, 48 Cal., 493, is cited to show that the act in question here confers corporate power. This we think is not the case. The grant there was of an easement in the streets of a city. The court held, and properly, that the State had no proprietary interest in the streets of a city dedicated to public use; that such a grant was the grant of a franchise, which could not be made by a special act. Here, how-

ever, the State was the proprietor of the Hocking canal, and could, as it did, grant it, not as a franchise, but as property of which it was the owner.

It is also contended that the act confers a power on the defendant to lease a railroad not conferred on other roads under like circumstances. It is a sufficient answer to this to say, that the power conferred is not to lease a *railroad*, but to lease *land* for the purpose of a railroad in process of construction; and this any company may do in acquiring its right of way. The State has no railroad to lease, it has simply land for such purpose. The company by the lease does not obtain the control of a competitor, it can, at most, become a competitor of another road; and the provision for leasing is,
67 therefore, neither within the letter nor spirit of the law regulating the leasing of one road by another.

We come now to the question, Does this law, as claimed, impair the obligation of contracts? As a first instance of this, it is claimed that it violates a contract of the State with the General Government. The facts are stated in detail in the petition. From these it appears that the General Government in 1828 donated 500,000 acres of land to aid the State in the construction of its canals. A portion of the proceeds of these lands were used in constructing the Hocking canal. By the act making the donation, the terms of which were accepted by the State, it was provided that "the said canals, when completed or used, shall be and forever remain public highways, for the use of the Government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same." It will be observed that the provision does not in terms oblige the State to keep up and maintain the canals for all time. The obligation is limited to the time "when completed or *used*." To require them to be kept up for all time, irrespective of their utility, would be unreasonable, and could not have been intended by the parties. It must certainly have been contemplated that, in course of time, the canals might become useless, as they have, for the purposes of commerce and navigation. The contract, as all others, must be given a reasonable construction. If such contingencies were not contemplated, yet an exception to the obligation would be created by the law of reason, and the State might abandon them without violating its contract with the United States. The
68 reasonable construction of the language then is, that, since the State is not by express language bound to keep up the canals for all time, so long as they are kept up and *used*, the obligation in favor of the General Government shall be observed; and when they cease to be kept up or *used*, the obligation ceases. This must have been the implicit understanding of the parties at the time; and therefore the State does not by this act impair the obligation of its contract with the General Government. But a more decisive answer to this contention is, we think, that none of these parties show that they were in any way parties to the agreement between the State and the United States, or that it was made for their benefit. They cannot insist that the contract of the State with

the United States shall be maintained for their benefit. The United States has not heretofore made, nor is it now making, any objection, and it would seem time enough to consider the matter when it does. Wright, one of the plaintiffs, says he made the improvements on his mill with reference to the contract, though there is not a word in the contract of his predecessor, Worthington, from whom he claims to derive his rights, in respect to the matter. But what legal right has any one to make investments on the faith of a contract between others and to which he is not a party or privy and insist for that reason that the contract shall be observed by either of the parties? We see none.

We pass now to a brief notice of the special facts of the several cases. Wright insists that the abandonment of the canal will impair the obligation of a contract made between the State and his predecessor in title, Thomas Worthington, to whose rights he has
69 succeeded; and which was made at the time the canal was constructed. Worthington then owned a grist-mill located on the Hocking river, which was supplied with water from the river by a dam constructed on it. That in consideration of his granting the State the right to construct the canal through the river and his lands and to appropriate the water to the use of the canal, the State agreed to enlarge and forever maintain the dam across the river above the mill, so as to afford an ample supply of water both for the canal and the mill. He does not and cannot, claim any title in the canal or its lands. This part of the canal was constructed under the act of 1825 whereby the State took a fee-simple in all the lands appropriated by it for the use of its canals. *State ex rel. v. Railway Co.*, 53 Ohio St., 189, 243; *State of Ohio v. Snook et al.*, 53 Ohio St., 121; *Malone v. Toledo*, 34 Ohio St., 541. Whether the obligation of this contract is one that runs with the land in favor of a purchaser of Worthington, or was simply personal and did not accompany the land in the ownership of others, or whether it appears, from the facts alleged, that he will be injured by the vacation of the canal, or in such an obligation as must end with the abandonment of the canal, (*Hubbard v. Toledo*, 21 Ohio St., 379; *Fox v. Cincinnati*, 33 *id.*, 492,) need not be determined in this case. His remedy would be in damages for the breach of the contract and not to enjoin the company from entering upon the lands purchased from the State, and in which he has no interest. His remedy, if any, is saved to him by the provision in the statute, that "the company shall not disturb any vested rights or privileges of abutting property-holders along said canal, and shall hold the State harmless from all loss or damages resulting to such
70 property-holders by reason of the construction and operation of said railroad."

What has just been said applies with equal, if not greater, reason to the claim of Shotwell. It is certainly settled by the decisions just cited, that a contract made by the State through its board of public works with an individual for the use of the water of any of its canals for a period of years, terminates with the use of the canal, and that it is under no obligation to keep up the canal for such purpose, after

the canal has become useless for the purpose of navigation and has been abandoned. The agents of the State have no power to make such a contract in the name of the State or to bind it thereby.

It is claimed by some of the plaintiffs that they have interests in the canal as abutting property-holders, and that they cannot be deprived of these rights without compensation, and may enjoin the company from taking possession of the lands until their interests have been condemned and paid for by appropriation proceedings. The company is enjoined by the statute from interfering with the vested rights of abutting owners, until compensation has been made. It does not, however, define what these vested rights are. Manifestly to be vested, they must be such as are recognized by law, as property of an individual that could be enforced against the State. If the right does not exist as against the State, it does not as against the company. *Fox v. Cincinnati*, 33 Ohio St., 492, 502. The claim of these parties is based upon the decision in *Street Railway Co. v. Cummingsville*, 14 Ohio St., 523. That was the case of a street that the company was about to occupy with its track, and two of the defendants in error were
71 abutting property-holders on the street; and it was held that they had such rights in the street for the purposes of ingress and egress as could not be taken until paid for. But the owner of property abutting on a canal has not the same, nor a similar, interest in it, that an owner of property abutting on a highway or street has. The owner of property abutting on a street or highway has, for the purposes of access to his property a direct and not an incidental interest in the street. It is one of the purposes for which the street was established. But an owner of property abutting on a canal has no such interest in the canal. Such benefits as he may derive from it in the way of water, drainage, etc., are accidental and the fact that he is an abutting owner confers no right on him to insist that the canal shall be kept up and maintained to secure him in the enjoyment of such advantages; and can maintain no action to prevent the canal from being abandoned. This is well settled by the decisions in this State, and seems well sustained by reason and the analogies of the law. In general, one owner can claim no right to such advantages as he may enjoy from the manner in which an adjacent owner may, for the time being, occupy and use his own property. Hence, the claim of Vought, that he cannot be deprived of the use of the canal as a means of drainage for his farm, until compensation has been made him for the benefit thus conferred on his land, though he has put in many miles of tiling with reference to the canal as a means of drainage, cannot be sustained.

Finally it is claimed by Vought and Walsh that the portion of the canal on which their lands are situate was formerly owned and constructed by the Lancaster Lateral Canal Co., a private
72 corporation organized under an act of the legislature in 1826 (24 Ohio Laws, 71). That under an act of the legislature, the State purchased the canal of this company in 1838, and it then became a part of the Hocking canal. That by the terms of the act under which the Lateral Company was organized it only took an

easement in the lands taken by it for canal purposes, and that the State by the purchase acquired no other or greater title than the company had to convey; and hence that on the abandonment of this part of the canal the land reverts to the owners of the freehold. The question here presented seems settled by the previous decisions of this court. In *Corwin v. Cowan*, 12 Ohio St., 629, the question arose as to the title to the Warren County canal, after it had been abandoned by the State. The canal had been constructed, as in this case, by a private corporation, organized under an act of the legislature, and was afterwards purchased by the State and made a part of its canal system under an act of the legislature. The company had been authorized by its charter to enter upon, take and use such lands as might be necessary for the location and construction of its canal. The court held, that the act authorizing the purchase of the canal was prospective in its nature and did not affect the locations and appropriations of lands which had previously been made by the canal company, and that the easement which the company had acquired by location and appropriation, passed to the State under the act without being enlarged into a fee-simple estate in the lands so appropriated; and further that upon the abandonment of the canal by the State, the easement terminated, and the right to the possession of the lands constituting the line of the canal reverted to the
73 owners of the freehold. A similar question arose in the case of *McComb v. Stewart*, 40 Ohio St., 647, and it is there said, page 665, "Whether the property taken is paid for in money or in accruing benefits and advantages, it should clearly appear by the terms of the act that it was the legislative intent to take a fee before such effect can be given to it. In the absence of express words, a fee will not be deemed to be taken where the purposes of the act will be satisfied with the taking of an easement." Citing *Washington Cemetery v. Railroad Co.*, 68 N. Y., 591. The judge then quotes from Cooley as follows: "In any case an easement only would be taken, unless the statute plainly contemplated and provided for the appropriation of a larger interest." Const. Lim., 559.

A careful consideration of the act under which the Lateral Company acquired its lands for canal purposes, fails to disclose any purpose whatever to authorize it to acquire a fee-simple therein. It is provided in section 8 of the act that it should be lawful for the directors "to enter upon and take possession of lands, etc., necessary to make said canal," and in case the lands are not *given* or *granted*, and they are unable to agree with the owner, to appropriate the same. When appropriated they are to take a complete title to the premises to the extent and for the purposes set forth in and contemplated by the act. The purpose contemplated by the act is the use of the land for canal purposes so long as the canal is maintained. So that when the use ends the title, they were permitted to take, ends; for it is not a title in fee-simple they are permitted to take, but a *complete* one for the uses and purposes of the canal. The company
74 could not then when the use ends sell them to others, on the contrary the lands must revert to the owner of the freehold. And, as held in *Corwin v. Cowan*, the State took no greater estate in

the lands than the company had to convey, the result is the same, on their abandonment by the State for canal purposes, as if the company had continued to use them to the time of the abandonment.

What has just been said relates, however, to the simple abandonment of a canal, as in the case of *Corwin v. Cowan, supra.* Where, however, as in this case, the abandonment of a canal is made as part of a transaction by which the easement is conveyed by the owner for a similar use—as for the purposes of a railroad—the original easement in the lands is not extinguished, but passes to the purchaser, who takes it subject to the duty of making compensation to the owner of the freehold for the additional burthen imposed on the land, and such damages as may result to him from the new use. *Hatch v. Railroad Co.*, 18 Ohio St., 92, 122. In this case the canal, by an agreement between the canal company and the railroad company, had been acquired and taken possession of by the latter company; and on the claim of the plaintiff, a land-owner, the court said: "The plaintiff was entitled to compensation from the railroad company for the full value of such land as it may have taken from him not embraced in the appropriation made by the canal company; and for such additional burdens as may have been imposed on the lands covered by the original appropriation; and for damage done or accruing to his adjacent lands, by reason of the additional burthen, if any, and of the change of structure and of use from those of a canal to those of a railroad, in so far as such damages are
75 peculiar to himself as a proprietor, and not common to the public at large. As the owner of land, subject to a perpetual easement, but appropriated and paid for only for the purposes of a canal, he had rights which the railroad company cannot be permitted to ignore; and which, we think, it ought to have instituted proceedings regularly, under the statute, to condemn and pay for, before it ventured to divert the easement to uses so varient from those originally intended. But this not having been done, and the plaintiff having resorted to this action for compensation, the rights of the parties are governed by the same principles which would have been applicable in such a proceeding." The principles of this case have never been disturbed, and may be regarded as the settled law of the State. It settles the rights of the parties in the cases of Vought and Walsh, and the rules by which compensation and damages are to be awarded to each of them, in a proceeding by the railroad company to condemn their lands.

The court then is of the opinion that the judgment in the case of Wright, and also in the case of Shotwell should be affirmed; and that the judgment in the case of Vought and in that of Walsh should be reversed; and judgment rendered in favor of each enjoining the railroad company from entering upon the lands of either, until condemned and paid for according to law.

Judgment in each case accordingly.

Burket, J., dissents as to the 5th paragraph *fo* the syllabus.

76 In the Supreme Court of Ohio.

I hereby certify that the foregoing is a full and true copy of the decision of the supreme court of Ohio, delivered in the cases of Michael S. Vought *vs.* The Columbus, Hocking Valley & Athens R. R. Co., John J. Walsh *vs.* The Columbus, Hocking Valley & Athens R. R. Co., and Robert Wright *vs.* The Columbus, Hocking Valley & Athens R. R. Co., all of said three cases having been heard and decided together, and there being but one opinion in all of said cases, of which the foregoing is a full and true copy taken from the original in my possession.

E. O. RANDALL,
Reporter of the Supreme Court.

77 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of the plea which is in the said supreme court of the State of Ohio, before you, being the highest court of law or equity in the said State in which a decision *sh*ould be had in the said suit between John J. Walsh and The Columbus, Hocking Valley & Athens Railroad Company, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the laws of the United States and to the Constitution of the United States, and the decision was in favor of the validity of said statute, a manifest error hath happened, to the great damage of the said John J. Walsh, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, within thirty days from the date thereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct
78 that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk U. S. C. C., S. D. O.,
By ROB'T C. GEORGI, *Deputy.*

Allowed and approved by me—

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of Ohio.

79 [Endorsed:] John J. Walsh *vs.* C., H. V. & A. R. R. Co. Writ of error.

80 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Columbus, Hocking Valley & Athens Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio wherein John J. Walsh is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. T. Spear, chief justice of the supreme court of the State of Ohio, this 16th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of the State of Ohio.

Service by copy of the above citation is hereby acknowledged this 19th day of May, A. D. 1898.

SELWYN N. OWEN,
Attorney and of Counsel for the Defendant in Error.

81 [Endorsed:] John J. Walsh *vs.* C., H. V. & A. R. R. Co. Citation.

82 *Assignment of Errors.*

Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety-eight.

JOHN J. WALSH, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said John J. Walsh, by Joseph B. Foraker, Richard A. Harrison, Daniel J. Ryan, and Thomas E. Powell, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

The supreme court of the State of Ohio erred in holding and deciding that the act of the General Assembly of the State of Ohio passed May 18, 1894, entitled "An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company," is not in violation of nor repugnant to the Constitution of the United States, and that the said act does not impair the obligation of contracts in either of the particulars as claimed by the said plaintiff in error.

83 Said supreme court of the State of Ohio erred in deciding and holding that the said act of the General Assembly of the State of Ohio passed May 18, 1894, was and is valid and binding upon said plaintiff in error.

And the said John J. Walsh prays that the judgment aforesaid of the supreme court of the State of Ohio may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by reason of the said judgment.

R. A. HARRISON,
J. B. FORAKER,
T. E. POWELL, AND
D. J. RYAN,
Attorneys for Plaintiff in Error.

84 [Endorsed:] John J. Walsh *vs.* C., H. V. & A. R. R. Co. Assignment of errors.

[Endorsed:] Supreme court of Ohio. John J. Walsh *vs.* The Columbus, Hocking Valley and Athens Railroad Co. No. 5622. Certified transcript.

Endorsed on cover: Case No. 16,901. Ohio supreme court. Term No., 316. John J. Walsh, plaintiff in error, *vs.* The Columbus, Hocking Valley and Athens Railroad Company. Filed June 9th, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 353.

ROBERT WRIGHT, PLAINTIFF IN ERROR,

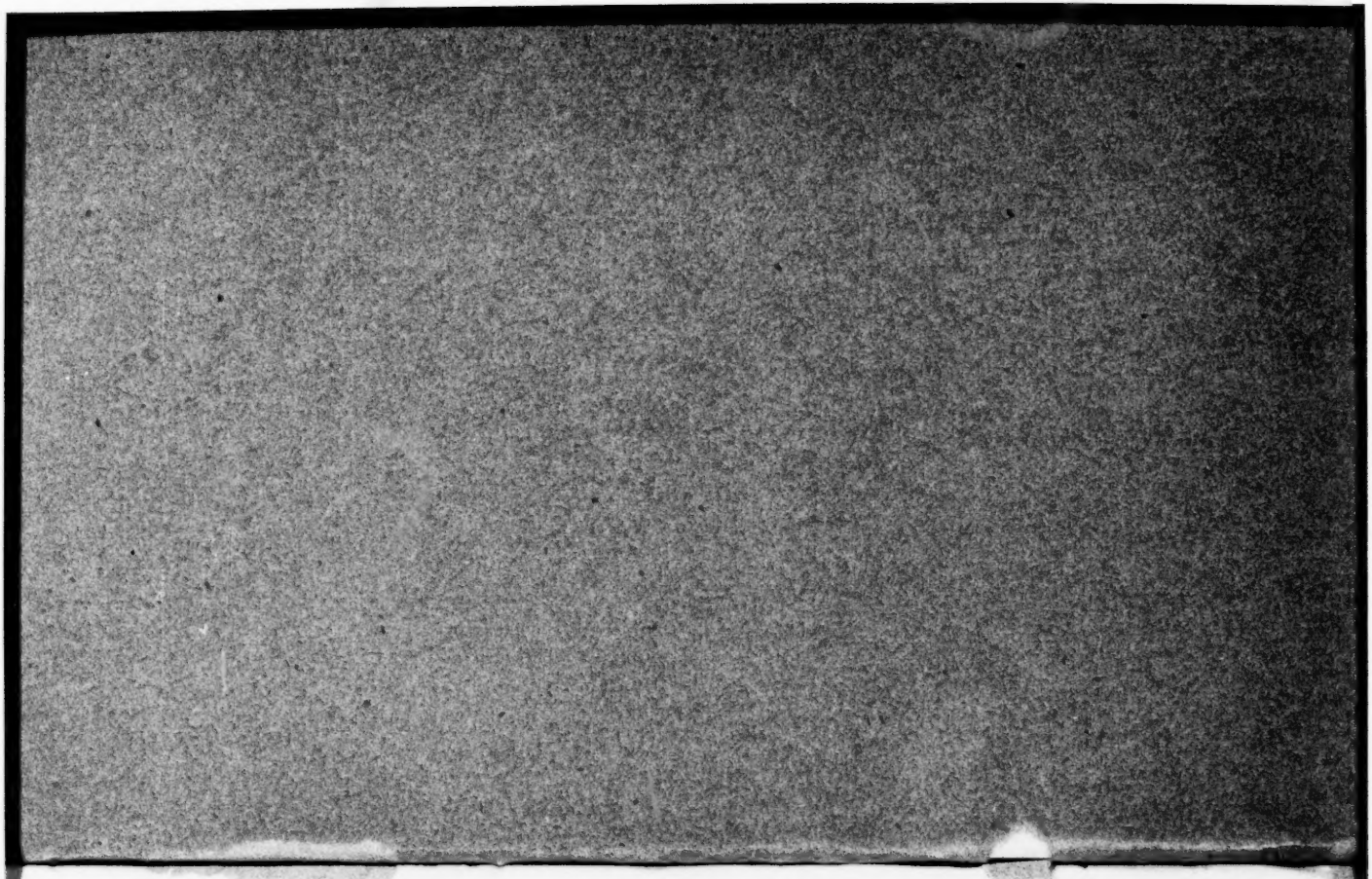
vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED OCTOBER 24, 1895.

(16,902.)



(16,902.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 317.

ROBERT WRIGHT, PLAINTIFF IN ERROR,

vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

	Original	Print.
Caption	1	1
Petition in error	5	1
Waiver of summons in error, &c.	6	2
Transcript from circuit court of Franklin county	7	2
Docket and journal entries	7	2
Judgment entered	7	2
Judgment	8	2
Transcript from court of common pleas	9	3
Docket entries	9	3
Order to amend	9	3
Judgment	10	3
Petition	11	4
Docket entries	28	14
Judgment	28	14
Order to certify Federal question	29	14
Clerk's certificate	31	15
Writ of error	32	16
Citation and service	35	17
Assignment of errors	37	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1898.

1–4 Supreme Court of Ohio.

ROBERT WRIGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILroad Company, Defendant in Error. } No. 5623.

Record.

In error to the circuit court of Franklin county.

R. A. Harrison, T. E. Powell, J. B. Foraker, D. J. Ryan, attorneys for plaintiff in error.
D. L. Sleeper, attorney for defendant in error.

Filed Aug. 4, 1897. Supreme court Ohio.
J. B. ALLEN, *Clerk.*

5 Supreme Court of Ohio.

ROBERT WRIGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILroad Company, Defendant in Error. } No. 5623.

Petition in Error.

(Filed June 25, 1897.)

The said Robert Wright, plaintiff in error, complains of The Columbus, Hocking Valley and Athens Railroad Company, defendant in error, and says:

That at the January term, A. D. 1897, of the circuit court in and for Franklin county, Ohio, to wit: on the 2d day of April, A. D. 1897, the defendant in error recovered a judgment against the plaintiff in error in a certain action then pending in said court, wherein the said plaintiff in error was plaintiff and the defendant in error was defendant, together with the costs of suit; a certified copy of the journal entries in said action, together with the original papers therein, is herewith filed.

Plaintiff in error avers that there is error in said judgment, proceedings, and record in this, to wit:

1. Said circuit court erred in sustaining the demurrer of the defendant to the plaintiff's petition.

6 2. Said court erred in dismissing the plaintiff's petition in said cause.

3. Said court erred in rendering judgment against the plaintiff for the costs of said action.

Wherefore, the plaintiff in error prays that said judgment of the

circuit court be reversed and that the plaintiff in error may be restored to all things he has lost by reason thereof.

R. A. HARRISON,
T. E. POWELL,
J. B. FORAKER,
D. J. RYAN,
Attorneys for Plaintiff in Error.

The defendant in error hereby waives the issue and service of summons in error in the above-entitled cause and enters the appearance of the defendant in error herein.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD CO.,
By D. L. SLEEPER,
Attorney for Defendant in Error.

7 *Transcript of Docket and Journal Entries.*

In the Circuit Court.

(Filed June 25, 1897.)

1895, April 22.—Appeal bond filed.
1895, April 22.—Transcript, journal entries filed.
1895, April 22.—Original papers filed.
1897, April 2.—Plaintiff's demurrer sustained. Defendant to recover costs of plaintiff. Exceptions by plaintiff. 4-595.

January Term, April 2, 1897.

This day came the parties and thereupon this cause came on to be heard on the demurrer filed by the defendant herein to the petition of the plaintiff, and was argued by counsel and submitted to the court; on consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing and not desiring to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein expended. To all of which orders, judgments and decrees the plaintiff by his counsel excepts.
(Duly certified.)

8 In the Circuit Court, Franklin County, Ohio.

ROBERT WRIGHT, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILWAY, Defendant. } No. 1080.

Entry.

(Filed April 2, 1897.)

This day came the parties and thereupon this cause came on to be

heard on the demurrer filed by the defendant herein to the petition of the plaintiff and was argued by counsel and submitted to the court;

On consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing, and not desiring to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein expended.

To all of which orders, judgments and decrees the plaintiff by his counsel excepts.

9 *Transcript of Journal Entries.*

In the Court of Common Pleas.

(Filed April 22, 1895.)

I, Charles F. Galloway, clerk of the court of common pleas, within and for the county of Franklin, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit:

1894, July 5.—Petition, affidavit and precipe filed. Summons issued to sheriff of Franklin county, Ohio. Returned July 16. Answer August 4, 1894. Copy of petition, $5.50.

1894, July 17.—Precipe filed. Alias summons issued to sheriff of Franklin county, O. Returned July 30. Answer August 18, 1894.

1894, July 30.—Motion of defendant filed.

1894, October 13.—Motion to strike out, filed by defendant. Motion to make definite filed by defendant.

1895, January 2.—Motion for trial filed by plaintiff.

1895, March 23.—Motion sustained. Leave to plaintiff to amend petition by April 6, 1895. 91–477.

1895, April 20.—Amendment to petition filed by consent. Copy amendment to petition 70c. Demurrer of defendant filed by consent. Judgment for costs *vs.* plaintiff. Notice of appeal bond fixed at $100.00. 93–297.

1895, April 22.—Appeal bond filed.

January Term, March 23, 1895.

This cause came on to be heard on the motion of the defendant to require the plaintiff to make his petition more definite and
10 certain, and was argued by counsel and submitted to the court; on consideration whereof, the court adjudged said motion well taken and sustained the same and ordered the plaintiff to amend his petition by stating with whom said contract was made to build and maintain said dam, and said plaintiff is given until April 6, 1895, to file said amendment.

April Term, April 20, 1895.

This cause came on to be heard upon the petition of the plaintiff and the amendment thereto and the demurrer of the plaintiff herein

filed. The court on consideration thereof, sustains the same to which — excepted, and thereupon the plaintiff failing to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff his costs herein expended, and the plaintiff giving notice of his intention to appeal this case to the circuit court, the court directs that the appeal bond be made payable to the defendant in the sum of $100.00.

(Duly certified.)

11 Court of Common Pleas, Franklin County, Ohio.

ROBERT WRIGHT, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY, Defendant.

Petition.

(Filed June 5, 1894.)

The said plaintiff says that he is a resident of the county of Hocking, and a citizen and tax-payer of the State of Ohio; that he is now, and for many years past has been the owner in fee-simple of a certain tract of land, situated in Falls township, in the county of Hocking, and bounded and described as follows:

Part of section No. ten (10), township fourteen (14), of range No. seventeen (17), beginning at a post at the intersection of the McArthurstown road and the south boundary line of said section No. ten (10), from which a black oak fourteen inches in diameter bears south eighty-seven degrees, west twenty-three and one-half (23½) links; thence north six degrees, west four (4) chains and thirty-two (32) links to a post in said road; thence north eighteen (18) degrees, east six (6) chains and seventy-seven (77) links to a post from which the southeast corner of a house bears north nineteen (19) degrees, east one hundred and fifty (150) links; thence north fifty-four and three-fourths (54¾) degrees, west two (2) chains and fifty-four
12 (54) links to a post in the forks of the road, from which a gum fourteen (14) inches in diameter bears north ten and one-half (10½) degrees, east one hundred and eighteen (118) links; thence north across the dam ten (10) chains and six (6) links to the center of the Hocking canal; thence with the canal north seventy-three and one-half (73½) degrees, east three (3) chains and seventy-four (74) links to a stake; thence north eighty-eight (88) degrees, east six (6) chains; thence south eighty-nine (89) degrees, east ten (10) chains and thirty (30) links; thence south eighty (80) degrees, east three chains and seventy-four (74) links to the center of the culvert and the canal; thence south ten (10) degrees, west seventy-eight (78) links; thence south eighteen (18) degrees, west three (3) chains and fifty (50) links to a point in the run; thence south forty-nine and one-half (49½) degrees, east two (2) chains and forty-one links to a sycamore on the north bank of the Hocking river; thence south twenty-five (25) degrees, west twelve chains and twenty (20)

links to a post in the corner of a meadow; thence south fifty-seven and one-half (57½) degrees, west four (4) chains and fifty links; thence south fifty-nine (59) degrees, west six (6) chains and eighteen (18) links to a post in the section line; thence with said line west nine (9) chains and eighteen links to the beginning, containing forty-four (44) acres more or less.

That many years ago the State of Ohio, through certain aid granted to the State by the United States, and by virtue of a certain contract entered into between the United States and the State of Ohio, which is hereafter more fully set forth, acquired the right to make a canal through the said lands, the same being an extension of the Ohio canal and known and commonly called the Hocking canal, which said canal passes along and through the lands of the plaintiff above described.

13 Plaintiff further says that the said Hocking canal which runs through the land as above stated, extends from the village of Carroll, in the county of Fairfield, and from the Hocking canal, through the counties of Fairfield and Athens, to the village of Nelsonville, in the said last-named county; and that the same has since its construction been a part of the canal system of the State of Ohio, and an extension of the Ohio canal, and the State of Ohio is the owner and in possession of said canal, which is now in use for navigation and other purposes hereinafter set forth.

Plaintiff further says that he is also owner of a certain mill located on said lands on the south side of said Hocking canal which is now and for many years past has been run and operated by water power supplied by said Hocking canal, and as hereinafter more fully set forth.

Plaintiff further says, that the said defendant, The Columbus, Hocking Valley and Athens Railroad Company, on the 12th day of April, 1894, filed with the secretary of state its articles of incorporation in said name, which articles of incorporation were then and there duly recorded, and that the principal office of said company, fixed by said articles, is at the city of Columbus, in the county of Franklin, in said State. Said corporation was organized for the purpose of building and operating a railroad from the city of Columbus, in the county of Franklin, and extending through the counties of Franklin, Fairfield, Hocking and Athens, to the city of Athens, all in the State of Ohio, the said corporation being authorized to exercise such powers, rights, privileges and franchises only as are provided for and conferred by the general laws of the State of Ohio, regulating the organization and incorporation of railroad companies.

14 Plaintiff further says that the said defendant, since the 18th day of May, 1894, has been and still is claiming the right, privilege and franchise of entering upon, taking possession of and controlling the Hocking canal, above described, especially that portion extending through the lands of plaintiff, above described, including all the property, rights, interests and appurtenances connected with said Hocking canal, between the points above named. The said defendant claims the right, privilege and franchise of taking possession, of

controlling said property and constructing and operating a railroad along and over the said canal, by virtue of an act of the General Assembly of the State of Ohio, passed on the 18th day of May, A. D. 1894. Said act is in words and figures following, to wit:

S. B. An act No. 315.

To provide for the abandonment of the Hocking canal for canal purposes and for leasing the same to the Columbus, Hocking Valley and Athens Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking canal, from its junction with the Ohio canal in the village of Carroll, Fairfield county, to its southeastern terminus in the village of Nelsonville, Athens county, be and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

SEC. 2. There is hereby granted the right, franchise, and privilege of constructing, maintaining and operating over, upon and along the Hocking canal and property of the State of Ohio adjacent thereto, a railroad with single or double tracks, side tracks,
15 switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley and Athens Railroad Company, its successors and assigns for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the treasurer of the State of Ohio, on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

SEC. 3. Said installment of fifty thousand dollars shall be paid into the State treasury before the construction of said railroad is begun, and for the remaining installments of rental the State of Ohio shall have the first lien upon said railroad, together with its switches, side tracks, bridges, and other structures erected on said property of the State of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said Columbus, Hocking Valley and Athens Railroad Company shall further execute unto the State of Ohio, to be approved by the auditor of State, the secretary of state and attorney general, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars conditioned that the said company will faithfully build said railroad in compliance with the conditions and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the State of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond shall be executed and filed with the secretary of state within ten days after the passage of this act.

SEC. 4. In consideration of the payment aforesaid, said railroad company, its successors and assigns, shall have the exclusive
16 right during the term aforesaid to use and occupy the prop-

erty aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property-holders along said canal, and shall hold the State harmless from all loss or damage resulting to such property-holders by reason of the construction and operation of said railroad. Provided that when said railroad, its successors and assigns cease to use said canal for railroad purposes, said canal property shall revert to the State for canal purposes.

SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this State.

SEC. 6. The work of constructing said railroad shall be commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

SEC. 7. This act shall take effect and be in force from and after its passage.

LEONIDAS H. SOUTHARD,
Speaker pro Tem. of the House of Representatives.
ANDREW L. HARRIS,
President of the Senate.

Passed May 18th, 1894.

The said Hocking Canal property, above described, was acquired by the State of Ohio, and the said canal was constructed under and by virtue of certain acts of the Congress of the United States, and of the General Assembly of the State of Ohio, and under and
17 by virtue of certain agreements entered into by and between the United States and the State of Ohio, as hereinafter set forth. That between the 23d day of February, 1820, and the 8th day of February, 1825, the General Assembly of the State of Ohio presented to the Senate and House of Representatives of the United States, memorials and resolutions in which *was* set forth the advantages which the United States would derive from the construction of certain canals, and particularly the Ohio canal, extending from the Ohio river at the mouth of the Scioto river, to Lake Erie, and requesting the Congress of the United States to grant to the State of Ohio aid in the construction of said canal and extensions thereof, which might afterwards be made.

And thereupon, in response to said resolutions and memorials, on the 24th day of May, 1828, the Congress of the United States passed an act entitled "An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State to aid in the construction of said canals authorized by law;" the fifth section of which act is in the words and figures following:

"SEC. 5. And be it further enacted, That there be and hereby is granted to the State of Ohio, five hundred thousand acres of the land owned by the United States, within the State of Ohio in the payment of the debt, or the interest thereon, which has heretofore

been, or which may hereafter be, contracted by said State in the construction of the canals within the same, undertaken under the authority of the laws of the said State now in force, or that may hereafter be enacted, for the extension of canals now making; which land, when selected, shall be disposed of by the legislature of
18 Ohio, for that purpose and no other: Provided, the said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same; and provided further, that the said canals, already commenced shall be completed in seven years from the approval of this act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales, shall not be affected by that failure."

It is further provided by the seventh section of the said act that "said act shall take effect provided the legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the State to the several provisions and conditions thereof; and unless such expression of assent be made, this act shall be wholly inoperative."

And thereupon, in pursuance of said act of Congress, on the 22d day of December, A. D. 1828, the General Assembly of the State of Ohio assented to the several provisions and conditions of said act; which said act is in the words and figures following, to wit:

"An act declaring the assent of the State of Ohio to the provisions and conditions of an act of Congress."

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the assent of the State of Ohio be, and the same is hereby expressed and declared to be given, to the several provisions and conditions of an act of Congress of the United States, approved twenty-fourth of May, eighteen hundred and twenty-eight, and entitled 'An act to aid the State of Ohio in extending the Miami
19 canal from Dayton to Lake Erie, and to grant a quantity of land to said State, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas Territory.'

"EDWARD KING,
"*Speaker of the House of Representatives.*
"SAMUEL WHEELER,
"*Speaker of the Senate.*

"December 22d, 1828."

That in pursuance of said agreement so entered into between the Congress of the United States and the General Assembly of the State of Ohio, the State of Ohio received and took possession of the said grant of five hundred thousand acres of land provided for in said act hereinbefore set forth, and has from time to time sold and disposed of

the same, and has received from the proceeds of such sale upwards of the sum of $2,200,000. That at the time of the passage of the several acts above mentioned, the Ohio canal, extending from the mouth of the Scioto river through the State of Ohio to Lake Erie, was then located and in process of construction, with its various branches and extensions, which said canal passed through the village of Carroll, in said county of Fairfield.

That afterwards, to wit: on the 8th day of February, A. D. 1826, (Ohio Laws, vol. 24, page 71,) the Lancaster Lateral Canal Company was incorporated by an act of the General Assembly of the State of Ohio, and authorized to construct and operate a canal extending from the village of Carroll to the town of Lancaster, in the county of Fairfield, connecting with the Ohio canal at the said village of Carroll.

And thereupon the said company so incorporated did con-
20 struct and operate the said canal between the points aforesaid until the 22d day of December, A. D. 1838, when the said Lancaster Lateral Canal Company sold and conveyed the said canal, between the said points, to the State of Ohio, the said purchase being made by the board of public works, by authority conferred upon the said board by an act of the General Assembly of the State of Ohio, passed March 9th, 1838. And thereupon, by deed of December 22d, 1838, the said Lancaster Lateral Canal Company, by deed of that date, conveyed the said canal and all its rights, interests, appurtenances and fixtures connected therewith, to the State of Ohio for the sum of $61,241, the said sum being paid to the said company by the board of public works, in pursuance of said act, out of the canal fund belonging to the State of Ohio, created by the sale of the lands granted by the United States, as hereinbefore set forth.

Afterwards, to wit, on March 7th, 1836, the General Assembly of the State of Ohio, by an act passed on that date, authorized the canal commissioners of the board of public works of the said State, to extend the said Lateral canal from its terminus in the town of Lancaster, to the town of Athens, in Athens county; and the said commissioners were, by the act, authorized to borrow on the credit of the State of Ohio $350,000, for the purpose of constructing the said canal; and afterwards the said commissioners were authorized, by an act of the General Assembly, to borrow the additional sum of $300,000, for the purpose of completing the said canal between the points aforesaid.

The plaintiff further says, that the said canal so authorized to be constructed, was completed and opened as a continuous line of canal for navigation purposes, on and prior to the first day of January,
1842. The entire purchase price of said Lateral canal, above
21 described, and the continuation thereof from Lancaster to Athens, as well as the loan above referred to, made for the purpose of constructing said canal, was paid out of the canal fund of the State of Ohio, which said fund was, in part at least, created by the proceeds of the sale of said lands granted to the State of Ohio as hereinbefore stated. And thereupon the said canal was

constructed by the State of Ohio and became and was, and ever since has been, an extension and continuation of the Ohio canal from the village of Carroll to its termination in the said county of Athens.

The plaintiff further says, that ever since the construction of said canal, which is and has been known as the Hocking canal, the same has been, and still is, a public highway, which has been used for the State of Ohio and the Government of the United States, in pursuance of the several acts of Congress and of the General Assembly of the State of Ohio, hereinbefore set forth.

Plaintiff further says, that the said grist-mill, located upon the lands above described, was originally constructed before the location and construction of the said Hocking canal, and the same was run and operatod by water power from the Hocking river until the canal was located and constructed, as hereinbefore stated. That at the time the said Hocking canal was located and constructed along and through the lands above described, it became necessary to appropriate the Hocking river, and the water power which had been used to supply said grist-mill, for the purposes of said canal.

That at said time one Thomas Worthington was the proprietor of said lands and the said grist-mill. And thereupon a contract was entered into by and between the said Thomas Worthington
22 and the State of Ohio, through its duly authorized agents, by which, in consideration of the granting to the State the right to construct said canal through said lands and appropriate the water of the Hocking river for the purpose of supplying said canal, the State of Ohio agreed with said Thomas Worthington to so enlarge and forever maintain the dam across the Hocking river above the said grist-mill, as to afford ample supply of water both for said canal and said grist-mill. And thereupon in pursuance of said agreement the said dam was so enlarged as to afford sufficient supply of water both for said canal and said grist-mill. That some two miles west of the said grist-mill the said canal ran directly into the Hocking river, and became a part thereof, and from said point to a short distance northwest of the said grist-mill the said canal continued in the bed of the Hocking river. That a short distance north of the said grist-mill the said canal again left the Hocking river, the canal passing to the north of said grist-mill and the Hocking river to the south, leaving the grist-mill between the two, and supplied by water power both from the canal and the river, under the arrangement made, as hereinbefore stated.

Plaintiff further says, that the said canal was constructed as aforesaid, and the said dam was built under and in pursuance of the terms of the said agreement entered into by and between the State of Ohio and the said Thomas Worthington. And that in pursuance of said contract all the water power necessary to run and operate the said grist-mill, has been supplied from the said canal and Hocking river, up to the present time.

Plaintiff further says, that he is the owner in fee-simple of the lands, tenements and rights described hereinbefore, by a direct

23 and connected chain of title from the said Thomas Worthington, and that plaintiff has ever since been and still is owner thereof, and all appurtenances, and that the said grist-mill has now been supplied, run and operated by water power from the said Hocking river and said canal, from the date of the construction of said canal down to the present time, a period of *of* about fifty-seven years.

Plaintiff further says, that relying upon the said contract made with the State, as aforesaid, and upon its faithful execution on the part of the State, he has from time to time repaired and improved the said grist mill and put the same in excellent condition so that the same is now very profitable, doing a large business and is very valuable, and the plaintiff is deriving therefrom large profits.

Plaintiff further says, that if the said defendant is permitted to enter upon said canal and construct its railroad thereon the water power which now operates said mill will be cut off and destroyed and the value of said property will be so affected and impaired as to render the same of very little or no value.

The plaintiff further says, that in addition to the lands and tenements, hereinbefore described, he is also the owner of and in possession of large tracts of land extending along both sides of said canal for a long distance east of the town of Logan, Hocking county. That said lands extend for a distance of over a mile east of the said town of Logan, and that the aggregate number of acres of said lands is over 1,000 acres.

Plaintiff further says, that a highway runs through and along said lands, which runs along and near the Hocking canal almost the entire length or distance through said lands. That there are also cross-highways, making easy access to and egress from all portions of said lands. The said lands are all in a high state

24 of cultivation and are now being actually cultivated by plaintiff, who is in possession thereof. He says that the construction of said railroad along and upon said canal, will place increased burdens upon his said lands, will cut off and destroy his access to the different parts of the lands by and through the highways running through the same, as hereinbefore stated, and will render his access to and egress from different portions of his lands very difficult and inconvenient, and great additional burdens will be placed upon his said lands by reason of the change from a canal to a railroad, and he will be deprived of water privileges for his stock upon said land.

The plaintiff further says that the said act under which the said defendant claims the right to enter upon and take possession of the said canal, and to construct and operate a railroad thereon, passed on the 18th day of May, 1894, and commonly known as the Earnhart act, confers no authority, power, or right upon said defendant to enter upon said lands or to use the same for the purpose of building and operating a railroad, or for any other purpose whatever.

Plaintiff says that the said act is null and void, for the following reasons:

1. Because the said act conflicts with section 10, article 1, of the Constitution of the United States, which provides that " no State shall pass any bill impairing the obligation of contracts."

2. Because said act conflicts with section 28, article 2, of the constitution of the State of Ohio, which provides "The General Assembly shall have no power to pass laws impairing the obligation of contracts."

3. Because said act conflicts with article 13, section 1, of the constitution of the State of Ohio, which prohibits the legislature from passing any special act conferring any corporate powers.

25 4. Because said act conflicts with section 16, article 2, of the constitution of the State of Ohio, which provides, " No bill shall contain more than one subject which shall be clearly expressed in the title."

5. The plaintiff further says that the said Hocking canal was at the time of said grant, and now is, worth at least from $600,000 to $700,000 for the purpose of the right of way for the construction of a railroad. That at the time of the passage of said act, the legislature of Ohio had before it a proposition from another railroad company duly incorporated under the laws of this State, having a larger capital and greater responsibility than the defendant, and which proposed to use said canal for the construction of a railway exactly as proposed by the defendant and proposed to construct the said railroad in a much shorter space of time ; the sum so offered by said other company being $5,000 a year larger than that for which said right of way was granted to the defendant, and at the same time it was proposed to the legislature that if such property was offered to competitive bidding the said other corporation would bid for the same an annual rental upon the basis of a valuation of $500,000.

6. The plaintiff further says that while the grant to the defendant of said canal, as hereinbefore stated, was in form a lease thereof, yet in substance and in fact it was a donation of the greater part of said property to the said defendant for its own private purposes ; that said act is null and void because it is against public policy, and against the rights and interests of the people of the State of Ohio, and it is not within the grant of legislative power given to the General Assembly by the provisions of article 2 of the constitution of Ohio.

7. The plaintiff further says, that the Lancaster Lateral Canal Company, which constructed the part of said Ohio canal be-

26 tween Carroll and Lancaster, acquired only the easement for the purposes of navigation along and over the lands through which said canal was located and constructed, and that by the conveyance of that part of the said property by said company to the State of Ohio, the State of Ohio only acquired the same right and interest in and to that portion of the said canal which the said Lancaster Lateral Canal Company had at the time of the said conveyance.

8. The plaintiff further says, that as the said grant made by the said act of the General Assembly of May 18th, 1894, purports to convey a greater title than the State had in the said canal property,

and also attempts to confer upon said defendant the right to use the said property for purposes other and different from that for which the State had the right to use the same, the said grant is excessive and greater than the General Assembly of Ohio had the power to convey, and therefore void.

Plaintiff further says that defendant is about to comply with the terms and provisions of the said act of the General Assembly of date May 18th, 1894; has already given bond to the State of Ohio, as provided for in said act, and has paid into the treasury of the State of Ohio the sum of fifty thousand dollars, as provided in said act, and said defendant is also unlawfully making preparations to build, maintain and operate said railroad on said lines and upon said canal, and for this purpose it is unlawfully and without authority threatening to take possession of said canal and all said property and fixtures connected therewith for the sole purpose of building, maintaining and operating a railroad thereon for all time to come, which, if consummated, will constitute a permanent trespass upon the plaintiff's property; that said defendant, by the destruction of said canal, will destroy the plaintiff's water
27 power which now supplies his grist mill, as hereinbefore stated, and will leave the plaintiff without any provision for the maintenance of the dam in the Hocking river, which now supplies the water power of said mill, and will particularly destroy the plaintiff's business, which is now very large and profitable, and will also place very large additional burdens upon plaintiff's lands by rendering his said farms inconvenient and difficult of access, and cut off his access to said highways now running through the same, and great and irreparable injury will be done to the plaintiff in the premises, unless the defendant is restrained by an order of this court, from taking possession of said canal and constructing a railroad thereon.

The said plaintiff, therefore, prays the court here, that the said defendant may be enjoined from entering upon the said canal property and taking possession of the same, and from constructing and operating a railroad thereon, and from doing any and all acts which are now threatened by said defendant in the premises, and especially that the said act of the General Assembly of Ohio of date May 18th, 1894, under which the said defendant claims to be acting, may be declared by the court to be null and void, and that upon the final hearing the plaintiff may have a perpetual injunction restraining the defendant from doing any and all the acts herein complained of, and for all other and proper relief in the premises.

ROBERT WRIGHT,
By WELDY & BUERHAUS,
W. P. PRICE,
DANIEL J. RYAN,
HARRISON, OLDS & HENDERSON,
POWELL, RICKETTS & BLACK,
J. B. FORAKER, AND
JNO. S. FRIESNER,
Attorneys for Plaintiff.

(Verification and certificate attached.)

28 *Certified Transcript of Docket and Journal Entries.*

THE STATE OF OHIO, } ss:
City of Columbus, }

In the Supreme Court of Ohio, January Term, A. D. 1898.

In the record and proceedings then and there had and held, among other things, is the following, to wit:

ROBERT WRIGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND Athens Railroad Company, Defendant in Error.

5623. Error to the Circuit Court of Franklin County.

June 25, 1897.—Petition in error & waiver of summons filed.
" " " Circuit court transcript filed.
" " " Original papers filed.
" 26, " Papers taken by D. J. Ryan.
Aug. 4, " " returned by D. J. Ryan.
" " " Printed record filed.
" 16, " Proof of service of printed record filed.
Sept. 30, " Motion by defendant to advance and notice filed.
Oct. 5, " Journal entry:

"Motion by defendant to advance cause No. 5623 on the general docket. Oral argument requested."

"Ordered by the court that said motion be, and the same is hereby, allowed, cause advanced, and briefs to be filed within rule. Oral argument noted."

Order Book No. 15, page 379.

Dec. 20, 1897.—Plaintiff's printed brief filed.
Mar. 22, 1898.—Journal entry:

"This cause came on to be heard upon the transcript of the record of the circuit court of Franklin county, and was argued by counsel; on consideration whereof it is ordered and ad-
29 judged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed, and, it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—.

Ordered that a special mandate be sent the court of common pleas of Franklin county to carry this judgment into execution.

Ordered that a copy of this entry be certified to the clerk of the circuit court of Franklin county 'for entry.'"

Order Book No. 16, page 34.

Mar. 29, 1898.—Mandate issued.

April 29, 1898.—Journal entry:

"On motion of the said plaintiff in error, this court doth order that it be certified and made a part of the record in this case and of the judgment rendered herein by this court at the present term thereof, to wit, on the 22nd day of March, A. D. 1898, and of the entry thereof, that in the rendition of said judgment it became and was material to the case to determine whether an act of the General Assembly of the State of Ohio entitled 'An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company,' passed May 18th, 1894, and found in volume 91, page 327, of the Laws of Ohio, is a law of said State and was and is of binding force and validity against the said plaintiff in error, on the hearing of said cause, claimed and asked this court to hold that the said act is in violation of and repugnant to section 10 of article I of the Constitution of the United States, which ordains that 'No State shall pass any bill impairing the obligation of contracts;' and this court orders it to be further certified that this court decided and adjudged that said act passed by the General Assembly of Ohio as aforesaid was not in violation of nor repugnant to said section 10 of article I of the Constitution of the United States, and decided and adjudged that said act was and is valid and binding upon said plaintiff in error, and thereupon rendered said judgment, which is founded upon said decision of this court that said act was and is of binding force and validity against the said plaintiff in error; and this court further ordered a special mandate to carry said judgment into execution, as is shown by the entry heretofore made of said judgment and order; and it is fur-
30 ther ordered by this court to be certified that the question of the validity of said act of the General Assembly in the particular mentioned hereinabove was drawn in question on the hearing and decision of this case as being repugnant to said section 10 of article 1 of the Constitution of the United States, and that the decision of the court was in favor of the validity of said act as against the said plaintiff in error; and it is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had."

Order Book No. 16, page 75.

31 Supreme Court of Ohio.

THE STATE OF OHIO, }
City of Columbus, } ss:

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing are all the entries in cause No. 5623, Robert Wright *vs.* The Columbus, Hocking Valley and Athens Railroad Company, and are truly taken and correctly copied from the minute and order books of said court, and that the printed record hereto attached is a true copy of the printed

record filed in this cause in this court and used in the consideration of said cause by said court.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court this twelfth day of May, A. D. 1898.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk.*

32 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of the plea which is in the said supreme court of the State of Ohio, before you, being the highest court of law or equity in the said State in which a decision *sh*ould be had in the said suit between Robert Wright and The Columbus, Hocking Valley & Athens Railroad Company, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the laws of the United States and to the Constitution of the United States, and the decision was in favor of the validity of said statute, a manifest error hath happened, to the great damage of the said Robert Wright, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct

33 that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk U. S. Circuit Court, S. D. O.,
By ROB'T C. GEORGI, *Dep.*

Allowed and approved by me—

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of Ohio.

34 [Endorsed:] Robert Wright *vs.* C., H. V. & A. R. R. Co. Writ of error.

35 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Columbus, Hocking Valley & Athens Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio wherein Robert Wright is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. T. Spear, chief justice of the supreme court of the State of Ohio, this 16th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of the State of Ohio.

Service by copy of the above citation is hereby acknowledged this 19th day of May, A. D. 1898.

SELWYN N. OWEN,
Of Counsel and Attorney for the Defendant in Error.

36 [Endorsed:] Robert Wright *vs.* C., H. V. & A. R. R. Co. Citation.

37 *Assignment of Errors.*

Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety-eight.

ROBERT WRIGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Robert Wright, by Joseph B. Foraker, Richard A. Harrison, Daniel J. Ryan, and Thomas E. Powell, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

The supreme court of the State of Ohio erred in holding and deciding that the act of the General Assembly of the State of Ohio passed May 18, 1894, entitled "An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company," is not in violation of nor repugnant to the Constitution of

the United States, and that the said act does not impair the obligation of contracts in either of the particulars as claimed by the said plaintiff in error.

38 Said supreme court of the State of Ohio erred in deciding and holding that the said act of the General Assembly of the State of Ohio passed May 18, 1894, was and is valid and binding upon said plaintiff in error.

And the said Robert Wright prays that the judgment aforesaid of the supreme court of the State of Ohio may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by reason of the said judgment.

R. A. HARRISON,
J. B. FORAKER,
T. E. POWELL, AND
D. J. RYAN,
Attorneys for Plaintiff in Error.

39 [Endorsed:] Robert Wright *vs.* C., H. V. & A. R. R. Co. Assignment of errors.

[Endorsed:] Supreme court of Ohio. Robert Wright *vs.* The Columbus, Hocking Valley and Athens Railroad Co. No. 5623. Certified transcript.

Endorsed on cover: Case No. 16,902. Ohio supreme court. Term No., 317. Robert Wright, plaintiff in error, *vs.* The Columbus, Hocking Valley & Athens Railroad Company. Filed June 9, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 92.

MICHAEL S. VOUGHT, PLAINTIFF IN ERROR,

vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JUNE 9, 1898.

(16,903.)

(16,903.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 318.

MICHAEL S. VOUGHT, PLAINTIFF IN ERROR,

vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

	Original.	Print.
Caption	1	1
Petition in error	5	1
Waiver of summons in error, &c.	6	2
Transcript from circuit court of Franklin county	7	2
Docket entries	7	2
Judgment entry	7	2
Judgment	8	2
Transcript from court of common pleas	9	3
Docket entries	9	3
Judgment entry	9	3
Petition	11	4
Præcipe for summons	27	13
Exhibit A—Act to incorporate the Lancaster Lateral Canal Co.	28	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1898.

	Original.	Print.
Motion to strike out	35	17
Demurrer	35	18
Judgment	36	18
Docket entries	37	18
Judgment	37	19
Order to certify Federal question	38	19
Clerk's certificate	40	21
Writ of error	41	22
Citation and service	44	22
Assignment of errors	46	22

1–4 Supreme Court of Ohio.

MICHAEL S. VOUGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILroad Company, Defendant in Error. } No. 5624.

Record.

In error to the circuit court of Franklin county.

R. A. Harrison, T. E. Powell, J. B. Foraker, D. J. Ryan, attorneys for plaintiff in error.
D. L. Sleeper, attorney for defendant in error.

Filed Aug. 4, 1897, in supreme court of Ohio.
J. B. ALLEN, *Clerk.*

5 Supreme Court of Ohio.

MICHAEL S. VOUGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILroad Company, Defendant in Error. } No. 5624.

Petition in Error.

(Filed June 25, 1897.)

The said Michael S. Vought, plaintiff in error, complains of The Columbus, Hocking Valley and Athens Railroad Company, defendant in error, and says:

That at the January term, A. D. 1897, of the circuit court in and for Franklin county, Ohio, to wit: on the 2d day of April, A. D. 1897, the defendant in error recovered a judgment by the consideration of said court against the plaintiff in error in a certain action then pending in said court, wherein the said plaintiff in error was plaintiff and the defendant in error was defendant, together with the costs of suit; a certified copy of the journal entries in said action, together with the original papers therein, is herewith filed.

Plaintiff in error avers that there is error in said judgment, proceedings, and record in this, to wit:

1. Said circuit court erred in sustaining the demurrer of the defendant to the plaintiff's petition.

6 2. Said court erred in dismissing the plaintiff's petition in said cause.

3. Said court erred in rendering judgment against the plaintiff for the costs of said action.

Wherefore, the plaintiff in error prays that said judgment of the

circuit court be reversed and that the plaintiff in error may be restored to all things he has lost by reason thereof.

R. A. HARRISON,
T. E. POWELL,
J. B. FORAKER,
D. J. RYAN,
Attorneys for Plaintiff in Error.

The defendant in error hereby waives the issue and service of summons in error in the above-entitled cause and enters the appearance of the defendant in error herein.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD CO.,
By D. L. SLEEPER,
Attorney for Defendant in Error.

7 *Transcript of Docket and Journal Entries.*

In the Circuit Court.

(Filed June 25, 1897.)

1895, April 10.—Appeal bond filed by plaintiff.
1895, April 10.—Transcript, journal entries filed.
1895, April 10.—Original papers filed.
1897, April 2.—Defendant's demurrer sustained. Defendant to recover costs of plaintiff. Exceptions by plaintiff. 4–595.

January Term, April 2, 1897.

This day came the parties and thereupon this cause came on to be heard upon the demurrer filed by the defendant herein to the petition of the plaintiff, and was argued by counsel and submitted to the court; on consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing and not desiring to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein expended. To all of which orders, judgments and decrees the plaintiff by his counsel excepts.
(Duly certified.)

8 In the Circuit Court, Franklin County, Ohio.

MICHAEL S. VOUGHT, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILWAY, Defendant. } No. 1069.

Entry.

(Filed April 2, 1897.)

This day came the parties and thereupon this cause came on to be heard on the demurrer filed by the defendant herein to the petition

of the plaintiff and was argued by counsel and submitted to the court;

On consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing, and not desiring to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein expended.

To all of which orders, judgments and decrees the plaintiff by his counsel excepts.

9 *Transcript of Journal Entries.*

In the Court of Common Pleas.

(Filed April 10, 1895.)

I, Charles F. Galloway, clerk of the court of common pleas, within and for the county of Franklin, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit:

1894, July 18.—Petition, affidavit and precipe filed. Summons issued to sheriff of Franklin county, Ohio. Returned July 30. Answer August 18, 1894. Copy of petition, $7.45.

1894, October 13.—Motion to strike out, filed by defendant.

1895, March 23.—Demurrer of defendant filed.

1895, March 23.—Motion overruled. Demurrer sustained. Petition dismissed at plaintiff's cost. Notice of appeal by plaintiff. Bond fixed at $200. 91-480.

1895, April 10.—Appeal bond filed.

January Term, March 23, 1895.

This cause came on to be heard on the motion filed by the defendant to the petition, and was argued by counsel and submitted to the court; on consideration whereof, the court adjudges said motion not well taken and overrules the same, and this cause further came on to be heard upon the demurrer of defendant to the petition herein filed, and was argued by counsel and submitted to the court, on consideration whereof, and the court being fully advised in the premises, it is adjudged by the court that said demurrer be
10 and the same hereby is sustained, to which the plaintiff excepts, and thereupon, the plaintiff not asking to amend his petition, it is further adjudged by the court, upon the pleadings, that said petition be dismissed, and that said defendant, The Columbus, Hocking Valley and Athens Railroad Company, go hence without a day, and recover of the said plaintiff its costs in this behalf expended and incurred, taxed at $—. To all of which the plaintiff excepts and gave notice of his intention to appeal this case to the circuit court, and the court do fix the amount of the bond to be given by plaintiff to perfect said appeal at $200.

(Duly certified.)

11 Court of Common Pleas, Franklin County, Ohio.

MICHAEL S. VOUGHT, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY, Defendant.

Petition.

(Filed June 9, 1894.)

The said plaintiff, Michael S. Vought, says, that he is a resident of the county of Fairfield, and a citizen and tax-payer of the State of Ohio. That he is now, and for some time past has been, the owner in fee-simple of a certain tract of land situated in the county of Fairfield and State of Ohio, and being parts of sections Nos. 20, 21 and 28, in Greenfield township, No. 15 and range 19, and bounded and described as follows:

On the north by the lands of George Buzzard and by the Hocking canal, on the east by the Hocking canal, and on the south by other lands of the plaintiff, and by the lands of Zebulon Peters, Silas Peters, W. W. Donaldson, John Duddleson and William Stanberry's heirs; and on the west by the lands of Silas Peters' heirs, John Duddleson, W. W. Donaldson, William Stanberry's heirs, M. A. Stanberry and John Ruff, containing six hundred acres more or less, all of which is in actual occupancy of plaintiff. That said lands are, and have been for many years, under a high state of improvement and used for the purposes of cultivation, and have
12 a special value from their location, and that for the purposes of reclaiming and draining said land, he has laid thereon about seventeen miles of drain tile.

Plaintiff further says, that heretofore, to wit: on the 8th day of February, 1826 (Ohio Laws, vol. 24, page 71) the Lancaster Lateral Canal Company was incorporated by an act of the General Assembly of the State of Ohio, and authorized to construct and operate a canal extending from the village of Carroll to the city of Lancaster, connecting with the Ohio canal at said village of Carroll.

A copy of which said act of incorporation is hereto attached marked "Exhibit A," and made a part of this petition.

Plaintiff further says, that in and by said act, said Lancaster Lateral Canal Company was authorized to appropriate lands for the purposes set forth therein, and in and by the same the said State of Ohio reserved the right to purchase said canal at its cost price. That thereupon said canal company acquired the right to use the lands upon which it is now located, for the purpose of a canal, and did construct the same. That afterwards and on the 22d day of December, 1838, the said State of Ohio elected to purchase said canal, and did, in fact, purchase the same and received a conveyance thereof from said canal company to be held and used by the State of Ohio for the purposes of navigation. A copy of said deed is in the words and figures following, to wit:

Whereas, by an act of the General Assembly of the State of Ohio, of the ninth of March, 1838, entitled "An act to authorize the board of public works to purchase for the use of the State of Ohio, the Lancaster Lateral canal," it is, amongst other things, provided, that the board of public works are thereby authorized and re-
13 quired, in the name and for the use of the State of Ohio, to purchase of the directors of the Lancaster Canal Company, the said canal, and hold the same for the use of the State, paying therefor the actual cost of locating, constructing and repairing the said canal, with lawful interest as the same shall be established by the oaths of the proper officers of said company, deducting therefrom the amount granted by the State in aid of said canal, with lawful interest thereon from the time of payment thereof.

And whereas, the said board of public works and the president and directors of said Lateral Canal Company, in conformity with the provisions of purchase above recited, have fixed and adjusted the sum to which the said company is entitled, at sixty-one thousand two hundred and forty-one dollars and four cents, being the actual cost of locating, constructing and repairing said canal, after deducting the amount granted by the State in aid of said canal, with interest thereon as the same has been established by the oaths of the proper officers of said company.

Now know ye, that the said Lateral Canal Company, for and in consideration of the premises and for and in consideration of the said sum of sixty-one thousand two hundred and forty-one dollars and four cents, to the said company paid by the State of Ohio, and for the purpose of carrying into effect the above-recited act, doth by these presents grant, bargain, sell and convey to the State of Ohio and its assigns, in fee-simple, the said Lancaster Lateral canal, with all the fixtures and easements thereto appertaining, for the purposes of navigation, to have and to hold the same to the said State of Ohio and its assigns forever, in as full and ample a manner as the said company now hold and possess the same.

14 In testimony whereof, the said company has caused their common seal to be hereto affixed by John Creed, their president, on this twenty-second day of December, A. D. eighteen hundred and thirty-eight (1838).

JOHN CREED, *President.* [SEAL.]

Signed, sealed, and delivered in presence of—
W. T. MARTIN.
JAMES TAYLOR, JR.

THE STATE OF OHIO, }
Franklin County, } ss:

Before me, the subscriber, an acting justice of the peace within and for said county, personally appeared John Creed, president of the Lancaster Lateral Canal Company, and acknowledged the foregoing instrument of writing to be the proper act and deed of said company, for the purposes therein mentioned.

Given under my hand and seal this 22d of December, A. D. 1838.

W. T. MARTIN,
Justice of the Peace.

LANCASTER, *Dec.* 22*d*, 1838.

At a meeting of the directors of "the Lancaster Lateral Canal Company."

Present: John Creed, president; Samuel F. McCracken, Thomas Ewing, Philemon Beecher, —— Scofield, Benjamin O'Connell, and Jacob Green.

Ordered that John Creed, president for the company, do place the common seal of the conveyance of this date, made by the company to the State of Ohio, of the Lancaster Lateral canal, and that said president acknowledge and deliver the said deed in the name of the company.

F. A. FOSTER, *Secretary.*

15 RECORDER'S OFFICE, FAIRFIELD COUNTY, OHIO.

This instrument of writing received December 24th, 1838, and recorded 29th same month in Book No. 4, pages 357 and 358.

Attest: W. L. KING, *R.*, *F. C.*

Endorsement on deed.

RECORDER'S OFFICE, FAIRFIELD COUNTY, OHIO.

This deed received December 24th, 1838, and recorded 29th same month in Book No. 4, page 358.

Attest: W. L. KING, *R.*, *F. C.*

Plaintiff says that many years ago the State of Ohio, through certain aid granted to the State by the United States, and by virtue of a certain compact entered into by the United States and the State of Ohio, which is hereafter more fully set forth, made certain purchases and acquired the right to extend said canal to the town of Nelsonville, in Athens county, and did complete and extend the same, and the same is known and commonly called the Hocking canal, and the east line of plaintiff's said lands is in the center of said canal. The plaintiff further says that the said Hocking canal extends from the village of Carroll, in Fairfield county, and the Ohio canal, through the counties of Fairfield, Hocking and Athens, to the village of Nelsonville, in the said last-named county; and the same has since its construction been a part of the canal system of the State of Ohio, and an extension of the Ohio canal, and the State of Ohio is the owner of and in possession of said canal, which is now in use for navigation and other purposes hereinafter set forth.

16 The plaintiff further says that the said defendant, The Columbus, Hocking Valley and Athens Railroad Company, on the 12th day of April, 1894, filed with the secretary of state its articles of incorporation in said name, which articles of incorporation were then and there duly recorded, and that the principal office of said company, fixed by said articles of incorporation, is at the city

of Columbus, in the county of Franklin, in said State. Said corporation was organized for the purpose of building and operating a railroad from the city of Columbus, in the county of Franklin, and extending through the counties of Franklin, Fairfield, Hocking and Athens, all in the State of Ohio, the said corporation being authorized to exercise such powers, rights, privileges and franchises only as are provided for and conferred by the general laws of the State of Ohio, regulating the organization and incorporation of railroad companies.

Plaintiff further says that said defendant, since the 18th day of May, 1894, has been and still is claiming the right, privilege and franchise of entering upon, taking possession of and controlling the Hocking canal, above described, and especially that portion extending through the lands of plaintiff, above described, including all the property, rights, interests and appurtenances connected with said Hocking canal, between the points above named. The said defendant claims the right, privilege and franchise of taking possession, controlling said property and constructing and operating a railroad along and over the said canal, by virtue of an act of the General Assembly of the State of Ohio, passed on the 18th day of May, A. D. 1894. Said act is in words and figures following, to wit:

17 S. B. An act No. 315.

To provide for the abandonment of the Hocking canal for canal purposes and for leasing the same to the Columbus, Hocking Valley and Athens Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking canal, from its junction with the Ohio canal in the village of Carroll, Fairfield county, to its southeastern terminus in the village of Nelsonville, Athens county, be and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

SEC. 2. There is hereby granted the right, franchise, and privilege of constructing, maintaining and operating over, upon and along the Hocking canal and property of the State of Ohio adjacent thereto, a railroad with single or double tracks, side tracks, switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley and Athens Railroad Company, its successors and assigns for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the treasurer of the State of Ohio, on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

SEC. 3. Said installment of fifty thousand dollars shall be paid into the State treasury before the construction of said railroad is begun, and for the remaining installments of rental the State
18 of Ohio shall have the first lien upon said railroad, together with its switches, side tracks, bridges, and other structures

erected on said property of the State of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said Columbus, Hocking Valley and Athens Railroad Company shall further execute unto the State of Ohio, to be approved by the auditor of state, the secretary of state and attorney general, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars conditioned that the said company will faithfully build said railroad in compliance with the conditions and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the State of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond shall be executed and filed with the secretary of state within ten days after the passage of this act.

SEC. 4. In consideration of the payment aforesaid, said railroad company, its successors and assigns, shall have the exclusive right during the term aforesaid to use and occupy the property aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property-holders along said canal, and shall hold the State harmless from all loss or damage resulting to such property-holders by reason of the construction and operation of said railroad. Provided that when said railroad, its successors and assigns cease to use said canal for railroad purposes, said canal property shall revert to the State for canal purposes.

SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this State.

19 SEC. 6. The work of constructing said railroad shall be commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

SEC. 7. This act shall take effect and be in force from and after its passage.

LEONIDAS H. SOUTHARD,
Speaker pro Tem. of the House of Representatives.
ANDREW L. HARRIS,
President of the Senate.

Passed May 18th, 1894.

The said Hocking Canal property, above described, was acquired by the State of Ohio by virtue of the acts relating to the Lancaster Lateral Canal Company, above set forth, and also by virtue of certain acts of the Congress of the United States, and by the General Assembly of the State of Ohio, under and by virtue of certain agreements entered into by and between the United States and the State of Ohio, as hereinafter set forth. That between the 23d day of February, 1820, and the 8th day of February, 1825, the General Assembly of the State of Ohio presented to the Senate and House of Representatives of the United States, memorials and resolutions in which were set forth the advantages which the United States would derive from the construction of certain canals, and particularly the

Ohio canal, extending from the Ohio river at the mouth of the Scioto river, to Lake Erie, and requesting the Congress of the United States to grant to the State of Ohio aid in the construction of said canal and extensions thereof, which might thereafter be made.

And thereupon, in response to said resolutions and memorials, on the 24th day of May, 1828, the Congress of the United States
20 passed an act entitled "An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State to aid in the construction of said canals authorized by law;" the fifth section of which act is in the words and figures following, to wit:

"SEC. 5. And be it further enacted, That there be and hereby is granted to the State of Ohio, five hundred thousand acres of the land owned by the United States, within the State of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, created by said State in the construction of the canals within the same, undertaken under the authority of the laws of the said State now in force, or that may hereafter be enacted, for the extension of canals now making; which lands, when selected, shall be disposed of by the legislature of Ohio, for that purpose and no other: Provided, the said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same; and provided further, that the said canals, already commenced shall be completed in seven years from the approval of this act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales, shall not be affected by that failure."

It was further provided by the seventh section of the said act that "said act shall take effect provided the legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the State to the several provisions and conditions thereof; and unless such expression of assent be made, this act shall be wholly inoperative."

21 And thereupon, in pursuance of said act of Congress, on the 22d day of December, A. D. 1828, the General Assembly of the State of Ohio assented to the several provisions and conditions of said act; which said act is in the words and figures following, to wit:

"An act declaring the assent of the State of Ohio to the provisions and conditions of an act of Congress." (See page 319.)

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the assent of the State of Ohio be, and the same is hereby expressed and declared to be given, to the several provisions and conditions of an act of Congress of the United States, approved twenty-fourth of May, eighteen hundred and twenty-eight, and entitled 'An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said

State, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas Territory.'

" EDWARD KING,
" *Speaker of the House of Representatives.*
" SAMUEL WHEELER,
" *Speaker of the Senate.*

" December 22d, 1828."

That in pursuance of said agreement so entered into between the Congress of the United States and the General Assembly of the State of Ohio, the State of Ohio received and took possession of the said grant of five hundred thousand acres of land provided for in said act hereinbefore set forth, and has from time to time sold and disposed of the same, and has received from the proceeds of such sale upwards of the sum of $2,200,000. That at the time of the passage of
22 the several acts above mentioned, the Ohio canal, extending from the mouth of the Scioto river through the State of Ohio to Lake Erie, was then located and in process of construction, with its various branches and extensions, which said canal passed through the village of Carroll, in said county of Fairfield. And that afterwards, on the date hereinbefore mentioned, the said Lancaster Lateral canal was purchased by the State of Ohio for the sum of $61,241, the said sum being paid to the said Lancaster Lateral Canal Company by the board of public works, in pursuance of said act, out of the canal funds belonging to the State of Ohio, derived from and created by the sale of the lands granted by the United States, as hereinbefore set forth.

Afterwards, to wit, on March 7th, 1836, the General Assembly of Ohio, by an act passed on that date, authorized the canal commissioners of the board of public works of the said State, to extend the said Lateral canal from its terminus in the town of Lancaster, to the town of Athens, in Athens county; and the said commissioners were, by the said act, authorized to borrow on the credit of the State of Ohio $350,000, for the purpose of constructing said canal; and afterwards the said commissioners were authorized, by an act of the General Assembly, to borrow the additional sum of $300,000, for the purpose of completing the said canal between the points aforesaid.

The plaintiff further says, that the said canal so authorized to be constructed, was completed and opened as a continuous line of canal for navigation purposes, on and prior to the first day of January, 1842. The entire purchase price of said Lateral canal, above described, and the continuation thereof from Lancaster to Athens, as well as the loan above referred to, made for the purpose of
23 constructing said canal, was paid out of the canal fund of the State of Ohio, which said fund was, in part at least, created by the proceeds of the sale of said lands granted to the State of Ohio as hereinbefore stated. And thereupon the said canal was constructed by the State of Ohio and became and was, and ever since has been, an extension and continuation of the Ohio canal

from the village of Carroll to its termination in the said county of Athens.

The plaintiff further says, that ever since the construction of said canal, which is and has been known as the Hocking canal, the same has been, and still is, a public highway, which has been used for the use of the State of Ohio and the Government of the United States, in pursuance of the several acts of Congress and of the General Assembly of the State of Ohio, hereinbefore set forth.

Plaintiff further says, that said canal cuts off from plaintiff's said land all the drainage from lands lying east therefrom, and the waters falling upon said lands east of plaintiff, as aforesaid, all run and flow into said canal, and plaintiff has provided for the drainage of all the water falling upon his said lands by means of tile drains, as before mentioned.

Plaintiff further says that the abandonment of the canal and the construction of said railroad will place increased burdens upon his said lands; will subject his said lands to the flow of waters from the east, which since the year 1836 have been intercepted by said canal, and subject them to overflow and render them unfit for the purposes of cultivation and greatly less valuable.

The plaintiff further says that the said act under which the said defendant claims the right to enter upon and take possession of the said canal, and to construct and operate a railroad thereon,
24 passed May 18, 1894, confers no authority, power, or right upon said defendant to enter upon said lands and to use the same for the purposes of building and operating a railroad, or for any other purpose.

Plaintiff says that the said act is null and void, for the following reasons:

1. Because the said act conflicts with section 10, article 1, of the Constitution of the United States, which provides that "no State shall pass any bill impairing the obligation of contracts."

2. Because said act conflicts with section 28, article 2, of the constitution of the State of Ohio, which provides that "the General Assembly shall have no power to pass laws impairing the obligation of contracts."

3. Because said act conflicts with article 13, section 1, of the constitution of the State of Ohio, which prohibits the legislature from passing any special act conferring corporate powers.

4. Because said act conflicts with section 16, article 2, of the constitution of the State of Ohio, which provides, that "no bill shall contain more than one subject which shall be clearly expressed in the title."

5. The plaintiff further says that the said Hocking canal was at the time of said grant, and now is, worth at least from $600,000 to $700,000 for the purposes of the right of way for the construction of a railroad. That at the time of the passage of said act, the legislature of Ohio had before it a proposition from another railroad company duly incorporated under the laws of this State, having a larger capital and greater responsibility than the defendant, and which proposed to use said canal for the construction of a railway

exactly as proposed by the defendant and proposed to construct
25 the railroad in a much shorter space of time; the sum so offered by said other company being $5,000 a year larger than that for which said right of way was granted to the defendant, and at the same time it was proposed to the legislature that if such property was offered to competitive bidding the said other corporation would bid for the same an annual rental upon the basis of a valuation of $500,000.

6. The plaintiff further says, that while the grant to the defendant of said canal, as hereinbefore stated, was in form a lease thereof, yet in substance and in fact it was a donation of the greater part of said property to the said defendant for its own private purposes; that said act is null and void because it is against public policy, and against the rights and interests of the people of Ohio, and it is not within the grant of legislative power given to the General Assembly by the provisions of article 2 of the constitution of Ohio.

7. The plaintiff further says, that the Lancaster Lateral Canal Company, which constructed the part of said Ohio canal between Carroll and Lancaster, acquired only the easement for the purposes of navigation along and over the lands through which said canal was located and constructed, and that by the conveyance of that part of the said property by said company to the State of Ohio, the State of Ohio only acquired the same right and interest in and to that portion of the said canal which the said Lancaster Lateral Canal Company had at the time of its said conveyance.

8. The plaintiff further says, that as the said grant made by the said act of the General Assembly of May 18th, 1894, purports to convey a greater title than the State had in the said canal property, and also attempts to confer upon said defendant the right to use the said property for purposes other and different from that for which the State had the right to use the same, the said grant is ex-
26 cessive and greater than the General Assembly of Ohio had the power to convey, and therefore void.

The plaintiff further says, that the said defendant is about to comply with the terms and provisions of the said act of the General Assembly of date of May 18th, 1894, and has already given bond to the State of Ohio, as provided for in said act, and the said defendant has made payment of the money provided to be paid by the said defendant in said act, and the said defendant is also unlawfully making preparations to build, maintain and operate said railroad upon said line and upon said canal, and for this purpose it is unlawfully and without authority threatening to take possession of said canal and all said property and fixtures connected therewith for the sole purpose of building, maintaining and operating a railroad thereon for all time to come, which, if consummated, will constitute a permanent injury and destruction of plaintiff's property and rights; that the said defendant, by the destruction of said canal, will irreparably injure the lands of plaintiff, hereinbefore set forth, and will destroy the value of the drainage system which said plaintiff has constructed upon his land, and will also place very large additional burdens upon said plaintiff's lands, and great and irrep-

arable injury will be done the plaintiff in the premises, unless the defendant is restrained from taking possession of said canal and constructing the railroad thereon.

The said plaintiff, therefore, prays the court here that the said defendant may be enjoined from entering upon said canal property and taking possession of the same, and from doing any of the acts which are now threatened by the said defendant in the premises, and especially that the said act of the General Assembly of Ohio of date May 13th, 1894, under which the said defendant claims
27 to be acting, may be declared by the court to be null and void, and that upon a final hearing the plaintiff may have a perpetual injunction restraining the defendant from doing any and all the acts herein complained of, and for all other and proper relief in the premises.

C. W. McCLEERY,
BRAZEE & BRAZEE,
J. B. FORAKER,
HARRISON, OLDS & HENDERSON,
POWELL, RICKETTS & BLACK, AND
DANIEL J. RYAN, *Attorneys for Plaintiff.*

(Verification and certificate attached.)

Precipe.

To the sheriff:

Issue summons in the above case returnable according to law. Indorse "Equitable relief."

C. W. McCLEERY,
BRAZEE & BRAZEE,
HARRISON, OLDS & HENDERSON,
J. B. FORAKER,
POWELL, RICKETTS & BLACK, AND
DANIEL J. RYAN, *Attorneys for Plaintiff.*

28 "EXHIBIT A."

(Copy.)

An act to incorporate the Lancaster Lateral Canal Company.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That Philemon Beecher, William W. Irvin, Thomas Ewing, John Creed, Elnathan Scofield, William Trimble, Jacob Claypool, Samuel F. McCrackin, Christian King, Jacob Green, Samuel Effinger, Richard Hooker, John A. Collins, Gotlieb Steinman, John Noble, Jacob Graybill, Isaac Mason, and also all other persons who shall become associated with them by subscribing to the capital stock of said company, be, and they are hereby, constituted and declared a body corporate and politic, with perpetual succession, by the name and style of the Lancaster Lateral Canal Company, for the purpose of making a navigable canal from the town of Lancaster to such

point of the Ohio canal as shall be found most eligible; and for this purpose the said company is hereby authorized and empowered to have and receive, purchase, possess, enjoy and retain lands, rents, goods, chattels and effects of any kind, and to any amount necessary to carry into effect the object of the institution; and the same to use, sell, alien and dispose of at pleasure; to sue and be sued, defend and be defended, in all courts having competent jurisdiction; to have and use a common seal, and the same to break, alter and renew at pleasure; to ordain and establish such rules, regulations and by-laws as may be necessary for the well ordering and governing the corporation; and generally to possess all the privileges and to do and perform all the acts necessary to a corporation, subject, however, to the restrictions, provisions and limitations contained in this act.

SEC. 2. That the capital of the said company shall consist of fifty thousand dollars, which stock shall be divided into shares of fifty dollars each, and shall be transferable in entire shares, in such manner as the rules of the corporation prescribe; provided, that no stockholder, without the consent of the directors, shall be at liberty to transfer his stock, after any installment is ordered, until such stockholder shall have paid the amount due on his stock.

SEC. 3. That the persons named in the first section of this act, or in case they should not all choose to serve, then any number of them not less than nine shall be commissioners to receive subscriptions, and also to do and perform all necessary acts to organize the company; and they are hereby authorized and empowered to cause books to be opened at such time and in such places as a majority of them shall think proper, to receive subscriptions to constitute the capital stock of said company; the commissioners may, if they think proper, require ten per centum of the amount of each subscription to be paid at the time it is subscribed; and each subscriber shall be bound to pay, from time to time, such installments on his stock as the directors may lawfully require.

SEC. 4. That when five hundred shares are subscribed the commissioners shall call a meeting of the subscribers, by causing notice of the time and place of such meeting to be published in some newspaper in general circulation in the places in which the books shall have been opened and the stock subscribed; and on such notice being given, the stockholders shall meet at the time and place appointed, and when so assembled, may proceed to elect directors and adopt such rules and regulations for the government of the corporation as are lawful and expedient; the stockholders may vote by person or by proxy, and for each share such stockholder may possess he shall be entitled to one vote.

SEC. 5. That the affairs of the company shall be managed by nine directors, or a majority of them, who shall be elected by the stockholders once in three years, unless a shorter period shall be ordained by the rules of the corporation; and each director shall be a stockholder at the time of his election, and shall cease to be a director if he cease to be a stockholder.

SEC. 6. That the directors so elected or appointed, shall, at their

first meeting after said election, choose one person from their own number, who shall serve as a president of the board, for and during the time for which he has been elected a director; the president and directors, previous to entering on the duties of their office, shall severally take an oath or affirmation, faithfully and impartially to discharge all duties appertaining to s-id office, by virtue of the provisions of this act or the rules of the corporation; they shall appoint a treasurer, and cause him to give bond, with security conditioned for the faithful performance of all duties appertaining to said office; they shall determine the amount of any installments, and the time when it shall be paid, but no stockholder shall be required to pay any installment until after such order has been published in some newspaper which circulates in the place where such stockholder resides, or where his stock was subscribed at least thirty days before the time of payment; neither shall any stockholder be bound to pay more than ten per centum on the amount of his stock at one time, nor more than thirty per cent. in any one year.

SEC. 7. That it shall be the treasurer's duty to keep the
31 books of the corporation; to receive and collect from subscribers and others, all moneys due the corporation, and on proper vouchers being produced, to pay out the same; he shall as often as required, exhibit to the directors an account of all sums of money by him so received and paid out, and the books, accounts and vouchers thus kept shall at all times be subject to the inspection of the stockholders; provided the said company shall never make use of their funds for banking purposes.

SEC. 8. That it shall and may be lawful for said directors to enter upon and take possession of any lands, waters and streams necessary to make said canal, or any of its appendages, such as feeders, dykes, locks, dams and other works, doing, nevertheless, no unnecessary damage; and in case any lands, waters or streams so wanted to be appropriated for any of the purposes aforesaid, shall not be given or granted to said corporation, and the proprietor or proprietors cannot, or do not agree with the directors as to the amount of damages or compensation which ought to be allowed or paid for the same, and shall not mutually agree on some person or persons to appraise the damages, it shall be lawful for the directors aforesaid, to apply to any judge of the court of common pleas of the county, not a stockholder in said company, who shall appoint three disinterested freeholders to assess the damages; the directors shall give notice to such persons of their appointment, and also to the adverse party, or his guardian, agent or attorney; and it shall be the duty of the persons appointed, to attend at the time and place specified in the notice, who, after being duly sworn or affirmed faithfully and impartially to discharge their appointed duties, shall proceed, on actual view, to make a just estimate and appraisement of any damage such individual owner or owners may sustain, tak-
32 ing into consideration the benefits which such proprietor or proprietors will derive from the location and making of said canal; and shall make a certificate of such appraisement, with a

particular description of the premises, to which certificate they, or a majority of them, shall sign their names, and deliver to each party one copy; and immediately thereafter, if no damages are assessed, or on the payment or tender of money, to the amount of damages assessed to the person or persons injured, his guardian, agent or attorney, the said directors may proceed to enter upon and occupy such lands, streams or waters, *and a complete title to the premises, to the extent and for the purposes set forth in, or contemplated by this act shall thereby be vested and forever remain in said company and their successors;* provided, however, that if either party shall consider himself aggrieved by the decision of the appraisers, so as aforesaid made, such party may apply to the court of common pleas, of the proper county, at the succeeding term of said court, or if there should not be a quorum of said court disinterested, then to the supreme court, at their next session in said county, giving ten days' notice of such intention to the adverse party; and the said court, upon good cause shown, shall appoint three disinterested freeholders who shall, after being duly qualified, proceed to view and appraise the damages, and shall certify their proceedings in the same manner as the former appraisers, and their decision shall be final and determinate, but the pendency of any such application to the court, shall not, in the meantime, hinder the progress of the work; provided, however, that this act shall not be so construed as to authorize the taking or diverting from their course, any streams or waters probably necessary to feed or supply the Ohio canal, without permission first obtained from the board of canal commissioners.

33 SEC. 9. That it shall be the duty of the company, hereby incorporated, to cut, make and construct said canal of such width and depth, with locks of such length and dimensions, as will be most economical and convenient for canal navigation, and it shall also be the duty of said company to construct a bridge over said canal, suitable for the passage of carriages, at each and every place where any State or county road crosses the same, and when the lands of any individual are so cut and divided as to leave any valuable portion on each side of the canal, the company, if required by the owner of such lands, shall build a suitable bridge to connect the same, *and when the said canal is so made and completed it shall forever thereafter be esteemed and taken to be navigable as a public highway*, free for the passage of boats, and for the transportation of all goods, commodities and products whatsoever, on payment of the tolls which may lawfully be required.

SEC. 10. That for and in consideration of the expense which the said company will necessarily incur in constructing said canal, with the appurtenances thereof, and in improving and keeping the same in repair, the said canal, with all the appurtenances thereof, together with all tolls and profits arising therefrom, are hereby vested in the said corporation; and the same shall be forever exempt and free from the payment of any tax, imposition or assessment, whatsoever; provided, that the State shall have power at any time after the completion of said canal, *to purchase and hold the same for the use of the State*, by paying to the said company therefor, such

sum as will be equal to the expense incurred by said company in surveying, locating, constructing and keeping the same in repair, together with ten per cent. thereon.

SEC. 11. That when the whole or any part of the canal is completed, according to the true intent and meaning of this act,
34 the president and directors shall have power, and it is hereby made their duty, to ordain and establish a rate of tolls, which shall be paid upon vessels, boats, rafts, or other property passing on such part or whole line of the canal that is navigable; and for the collection of said tolls, the president and directors shall appoint collectors and establish toll-houses at all proper places; and may ask, demand and receive, on all boats, rafts, vessels and other property passing or navigating on said canal, such tolls as shall be established agreeably to the provisions of this act; and also may rent, sell and dispose of any superabundant or waste waters of the canal; provided, that any subsequent legislature may regulate the rate of tolls which said company may receive at any time after the expiration of twenty years from the completion of said canal.

SEC. 12. That the president and directors shall, annually or semi-annually declare and make a dividend of the net profits arising from tolls, or from any other source, reserving such sum or sums as will defray the necessary current and probable contingent expenses, which dividend shall be paid or passed to the credit of the stockholders, severally, in proportion to the shares which each may hold in the stock of said company.

SEC. 13. That the company shall be entitled to the benefit of all laws which are, or shall be in force, for the collection of tolls, or for the protection of any canals constructed by this State, so far as such law or laws shall be necessary to insure the collection of tolls, or for the protection of the canal or other property which the company may lawfully hold, in order to carry into effect the provisions of this act.

WM. W. IRVIN,
Speaker of the House of Representatives.
ALLEN TRIMBLE,
Speaker of the Senate.

February 8, 1826.

(Ohio Laws, vol. 24, pages 71 to 77, inclusive.)

35 *Motion.*

(Filed Oct. 13, 1894.)

And now comes the defendant and moves the court here to strike out of the petition of plaintiff herein, as redundant and irrelevant, the following parts of the same, to wit: Beginning at the first word, "the," in the fifteenth line from the bottom of page 7, and ending with the word "failure," in the sixth line from the top of page 8.

Also, beginning with the word "which," in line fifteen from the

bottom of page 8, and ending with the figures "1828," in the last line of page 8.

LEVI J. BURGESS AND
D. L. SLEEPER,
Attorneys for Defendant.

Demurrer.

(Filed March 23, 1895.)

And now comes the defendant and demurs to the petition of the plaintiff, for the reason that the same does not state facts sufficient to constitute a cause of action against this said defendant.

L. J. BURGESS,
SELWYN N. OWEN,
GROSVENOR & JONES,
D. L. SLEEPER,
Attorneys for Defendant.

36 *Entry.*

(Filed March 23, 1895.)

This cause came on to be heard on the motion filed by defendant to the petition, and was argued by counsel and submitted to the court, on consideration whereof the court adjudges said motion not well taken and overrules the same, and this cause further came on to be heard upon the demurrer of defendant to the petition herein filed, and was argued by counsel and submitted to the court, on consideration whereof, and the court being fully advised in the premises, it is adjudged by the court that said demurrer be, and the same hereby is, sustained, to which the plaintiff excepts. And thereupon the plaintiff not asking to amend his petition, it is further adjudged by the court, upon the pleadings, that said petition be dismissed and that said defendant, The Columbus, Hocking Valley & Athens Railroad Company go hence without a day, and recover of the said plaintiff its costs in this behalf expended and incurred taxed at $—.

To all of which the plaintiff excepts and gave notice of his intention to appeal this case to the circuit court, and the court do fix the amount of the bond to be given by plaintiff to perfect said appeal, at $200.

37 *Certified Transcript of Docket and Journal Entries.*

THE STATE OF OHIO, }
City of Columbus, } ss:

In the Supreme Court of Ohio, January Term, A. D. 1898.

In the record and proceedings then and there had and held, among other things, is the following, to wit:

MICHAEL S. VOUGHT, Plaintiff in Error, vs. THE COLUMBUS, HOCKING VALLEY AND Athens Railroad Company, Defendant in Error.	# 5624. Error to the Circuit Court of Franklin County.

June 25, 1897.—Petition in error & waiver of summons filed.
" " " Circuit court transcript filed.
" " " Original papers filed.
" 26, " Papers taken by D. J. Ryan.
Aug. 4, " " returned by D. J. Ryan.
" " " Printed record filed.
" 16, " Proof of service of printed record filed.
Sept. 30, " Motion by defendant to advance and notice filed.
Oct. 5, " Journal entry:

"Motion by defendant to advance cause No. 5624 on the general docket. Oral argument requested."

"Ordered by the court that said motion be, and the same is hereby, allowed, cause advanced, and briefs to be filed within rule. Oral argument noted."

Order Book No. 15, page 379.

Dec. 20, 1897.—Plaintiff's printed brief filed.
Mar. 22, 1898.—Journal entry:

"This cause came on to be heard upon the transcript of the record of the circuit court of Franklin county, and was argued by counsel; on consideration whereof it is ordered and ad-
38 judged by this court that the judgment of the said circuit court be, and it hereby is, reversed at the costs of the defendant in error, to be taxed; and, rendering the judgment the court below should have rendered, it is ordered and adjudged that the said Columbus, Hocking Valley and Athens Railroad Company be, and is hereby, enjoined from entering upon the lands of the plaintiff in error described in his petition until it has condemned and paid for the additional burthen of constructing and operating a railroad on the land according to law. It is further ordered and adjudged that the plaintiff in error recover in this court and in the circuit court his costs in this behalf expended, to be taxed.

Ordered that a special mandate be sent the court of common pleas of Franklin county to carry this judgment into execution.

Ordered that a copy of this entry be certified to the clerk of the circuit court of Franklin county 'for entry.'"

Order Book No. 16, page 35.

Mar. 29, 1898.—Mandate issued.
April 29, 1898.—Journal entry:

"On motion of the said plaintiff in error, this court doth order that it be certified and made a part of the record in this case and of the judgment rendered herein by this court at the present term thereof, to wit, on the 22nd day of March, A. D. 1898, and of the

entry thereof, that in the rendition of said judgment it became and was material to the case to determine whether an act of the General Assembly of the State of Ohio entitled 'An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company,' passed May 18th, 1894, and found in volume 91, page 327, of the Laws of Ohio, is a law of said State and was and is of binding force and validity against the said plaintiff in error. The court order that it be further certified that said plaintiff in error, on the hearing of said cause, claimed and asked this court to hold that the said act is in violation of and repugnant to section 10 of article I of the Constitution of the United States, which ordains that 'No State shall pass any bill impairing the obligation of contracts;' and this court orders it to be further certified that this court decided and adjudged that said act passed by the General Assembly of Ohio as aforesaid was not in violation of nor repugnant to said section 10 of article I of the Constitution of the United
39 States, and decided and adjudged that said act was and is valid and binding upon said plaintiff in error, and thereupon rendered said judgment, which is founded upon said decision of this court that said act was and is of binding force and validity against the said plaintiff in error; and this court further ordered a special mandate to carry said judgment into execution, as is shown by the entry heretofore made of said judgment and order; and it is further ordered by this court to be certified that the question of the validity of said act of the General Assembly, in the particular mentioned hereinabove was drawn in question on the hearing and decision of this case as being repugnant to said section 10 of article 1 of the Constitution of the United States, and that the decision of the court was in favor of the validity of said act as against the said plaintiff in error; and it is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had."

Order Book No. 16, page 76.

40 Supreme Court of Ohio.

THE STATE OF OHIO, }
City of Columbus, } *ss:*

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing are all the entries in cause No. 5624, Michael S. Vought *vs.* The Columbus, Hocking Valley and Athens Railroad Company, and are truly taken and correctly copied from the minute and order books of said court, and that the printed record hereto attached is a true copy of the printed record filed in this cause in this court and used in the consideration of said cause by said court.

In witness whereof I have hereunto subscribed my name and

affixed the seal of said supreme court this twelfth day of May, A. D. 1898.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk.*

41 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of the plea which is in the said supreme court of the State of Ohio, before you, being the highest court of law or equity in the said State in which a decision should be had in the said suit between Michael S. Vought and the Columbus, Hocking Valley & Athens Railroad Company, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the laws of the United States and to the Constitution of the United States, and the decision was in favor of the validity of said statute, a manifest error hath happened, to the great damage of the said Michael S. Vought, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, within thirty days from the date thereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct
42 that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk U. S. Circuit Court, S D. O.,
By ROB'T C. GEORGI, *Deputy.*

Allowed and approved by me—

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of Ohio.

43 [Endorsed:] Michael S. Vought *vs.* C., H. V. & A. R. R. Co. Writ of error.

44 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Columbus, Hocking Valley & Athens Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio wherein Michael S. Vought is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ or error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. T. Spear, chief justice of the supreme court of the State of Ohio, this 16th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of the State of Ohio.

Service by copy of the above citation is hereby acknowledged the 19th day of May, A. D. 1898.

SELWYN N. OWEN,
Of Counsel and Attorney for the Defendant in Error.

45 [Endorsed:] Michael S. Vought *vs.* C., H. V. & A. R. R. Co. Citation.

46 *Assignment of Errors.*

Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety-eight.

MICHAEL S. VOUGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Michael S. Vought, by Joseph B. Foraker, Richard A. Harrison, Daniel J. Ryan, and Thomas E. Powell, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

The supreme court of the State of Ohio erred in holding and deciding that the act of the General Assembly of the State of Ohio passed May 18, 1894, entitled "An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company," is not in violation of nor repugnant to the Constitution of

the United States, and that the said act does not impair the obligation of contracts in either of the particulars as claimed by the said plaintiff in error.

47 Said supreme court of the State of Ohio erred in deciding and holding that the said act of the General Assembly of the State of Ohio passed May 18, 1894, was and is valid and binding upon said plaintiff in error.

And the said Michael S. Vought prays that the judgment aforesaid of the supreme court of the State of Ohio may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by reason of the said judgment.

R. A. HARRISON,
J. B. FORAKER,
T. E. POWELL, AND
D. J. RYAN,
Attorneys for Plaintiff in Error.

48 [Endorsed:] Michael S. Vought *vs.* C., H. V. & A. R. R. Co. Assignment of errors.

[Endorsed:] Supreme court of Ohio. Michael S. Vought *vs.* The Columbus, Hocking Valley and Athens Railroad Co. No. 5624. Certified transcript.

Endorsed on cover: Case No. 16,903. Ohio supreme court. Term No., 318. Michael S. Vought, plaintiff in error, *vs.* The Columbus, Hocking Valley & Athens Railroad Company. Filed June 9, 1898.